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No.

IN THE

Supreme Court of the United States

AFC COAL PROPERTIES, INC.,

Petitioner,

v.

DELTA MINE HOLDING COMPANY
and MEADOWLARK, INC.,

Respondents.

On Petition for Writ Of Certiorari to the United States Court Of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether all arbitrators whose awards are governed by the Federal Arbitration Act, 9 U.S.C. § 10 (1992), are subject to the disclosure standards established in *Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145 (1968), or, as the court of appeals held, whether there is no standard of disclosure for non-neutral, party-appointed arbitrators, thereby permitting them to conceal their substantial financial relationships with a party;

2. Whether an award may be vacated under § 10(a)(2) of the Federal Arbitration Act where the deciding vote is cast by a party-appointed arbitrator who is guilty of evident partiality under § 10(a)(2) and who deceives the Petitioner about his substantial relationship to the party appointing him and his interests and role in the arbitration, absent proof that the arbitrator's partiality otherwise prejudicially affected the award; and

3. Whether the court of appeals may rule that Petitioner waived the issue of an arbitrator's evident partiality when Respondents failed to raise waiver either in the district court or as a point of error on appeal.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption of this case includes all parties to the proceeding in the district court and the court of appeals.

Pursuant to Supreme Court Rule 29.6, Petitioner, AFC Coal Properties, Inc., ("AFC") states that American Financial Group, Inc., American Financial Corporation, and Great American Insurance Company are corporate parents of AFC Coal Properties, Inc. American Financial Group, Inc. and American Financial Corporation are the only publicly held companies that own more than 10% of AFC's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner AFC Coal Properties, Inc., ("AFC") respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 280 F.3d 815 (2001). The opinion of the United States District Court for the Eastern District of Missouri is unreported. Reproductions of the Eighth Circuit and district court opinions are appended as App. A, pp.1a-15a, and App. B, pp. 16a-53a, respectively.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on December 28, 2001. The Eighth Circuit denied AFC's timely rehearing petition on February 20, 2002. (App. C, p. 54a) AFC invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This petition involves the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.* (1992) ("FAA"), which is reproduced at App. D, pp. 55a-64a.

STATEMENT OF THE CASE

A. The Issue

This case presents an issue of vital importance to the practice of commercial arbitration in this country. Does a non-neutral arbitrator owe any duty to disclose his non-

trivial business interests and relationships with a litigant so that the parties and the other arbitrators have a full appreciation of the qualifications and integrity of the persons who decide their dispute.

In this case, the first and only federal circuit court decision of its kind, the Eighth Circuit reversed the district court's ruling that all arbitrators fully and fairly disclose their substantial business relationships with a party. In reversing, the Eighth Circuit panel concluded that under the FAA, a non-neutral party-appointed arbitrator has no duty to disclose:

- that he and his engineering company were secretly retained and paid nearly $200,000 by the Respondents – in addition to his arbitrator fees – to act as a litigation consultant preparing testimony and exhibits for presentation to the tribunal in which he was sitting as an arbitrator;
- that he had been paid $360,000 for recent past business with the Respondents and their affiliates;
- that he was hired for new and unrelated matters by Respondents' counsel during the arbitration.

In reaching this decision, the court determined that if the party arbitrators were not required to be disinterested, Petitioner should have assumed that the arbitrator appointed by Respondents could have such strong loyalties to Respondents that he was nothing more than a rubber stamp.

Creating disturbing new exceptions to the FAA's standards for confirming an arbitration award, and to the disclosure duties set down in this Court's seminal decision in *Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145 (1968), the court of appeals lowers the ethical bar for arbitrators by excusing non-neutral, party-appointed arbitrators from the duty to reveal their relationships to the

parties, their relevant business and financial interests, and the full extent of the roles they intend to play in the proceedings.

However, neither the FAA nor this Court's decision in *Commonwealth Coatings* makes distinctions between classes or types of arbitrators. Section 10(a)(2) of the statute authorizes a district court to vacate an arbitration award, "where there was evident partiality or corruption in the arbitrators, or either of them." 9 U.S.C. § 10(a)(2). (*See* App. D at p. 60a) Similarly, in *Commonwealth Coatings*, this Court established a federal standard for arbitrator disclosure whose rule and rationale apply to all arbitrators whose awards are subject to scrutiny under the FAA. Consistent with the fundamental principle that arbitration must "operate within some minimum levels of integrity," *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 571 (1976), the obligation to disclose is intended to help secure Congress' intention "to provide not merely for any arbitration but for an impartial one":

> We can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias.

Commonwealth Coatings, 393 U.S. at 147, 149.

In limiting the reach of *Commonwealth Coatings* to only certain arbitrators, the Eighth Circuit makes tripartite arbitration a breeding ground for the sharp and deceitful practices that occurred in this case, practices which will erode public trust in the arbitration process.

This case provides a timely opportunity for the Court to clarify that the doctrine laid out in *Commonwealth Coatings* is applicable to all arbitrators and to ensure integrity and public trust in an important sector of commercial arbitration.

B. The Arbitrations

Petitioner AFC and Respondents, Meadowlark, Inc. and the predecessor-in-interest of Delta Mine Holding Company (collectively "Delta") arbitrated two disputes under separate lease provisions which required that each dispute be decided by a majority vote of a three-member panel of arbitrators.[1] Under these provisions, each side picked one arbitrator and the two arbitrators then selected the third according to the then-applicable rules of the American Arbitration Association. Each arbitrator was required to be a professional mining engineer or firm of professional mining engineers. Delta appointed Alan Stagg as its arbitrator for each of the two arbitrations;[2] AFC named Paul Jones. In late 1997, by a vote of 2 to 1, each of the arbitration panels issued an award in favor of Delta. Stagg's was the deciding vote in each case.

C. Proceedings Below

Following the awards, Delta filed a Motion to Confirm the Saline County Award and a Motion to Modify and Confirm the Williamson County Award. AFC moved to vacate both awards pursuant to § 10 of the FAA. These proceedings were consolidated before the United States

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[1] Respondent Delta Mine Holding Company claims to be the successor-in-interest to Amax Coal and Meadowlark with respect to the arbitration awards. One dispute arose from the parties' "Williamson County Coal Mining Lease," the other from their "Saline County Coal Mining Lease." The arbitration provisions in the two leases are identical and the provisions are contained in App. E at pp. 65a-67a.

[2] Initially, Delta named Stagg's company, Stagg Engineering Services, Inc. ("SESI"), as its party arbitrator. However, only Stagg, SESI's president and sole owner, played any role as the party arbitrator, and all further references in the arbitrations were to Stagg as Delta's arbitrator. (App. B at p.19a)

District Court for the Eastern District of Missouri. The district court permitted limited discovery into the interests and activities of arbitrator Stagg.

On September 28, 2000, the district court issued its memorandum and order vacating both arbitration awards because of the evident partiality of Stagg. (*See* App. B)[3] The district court found that Stagg, acting in concert with the party that appointed him, actively concealed the nature and extent of his consulting relationships with Delta and its attorneys. Stagg's nondisclosures included concealment of his company's 12-50 prior engagements with Delta and related companies, and his employment by Delta's attorneys to provide expert witness and consulting services for the arbitrations that ultimately netted him and SESI more than $560,000. Of that amount $360,000 alone was billed just in the year before Stagg and SESI secretly agreed to provide Delta with "geologic consulting services" for the arbitration in this case. (App. B at p. 22a; R. at A0166) Stagg also concealed that most of his company's personnel, including his daughter, were involved in helping prepare Delta's case, including testimony and exhibits which were used at the arbitration hearings.[4] Stagg also never disclosed that during

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[3] Page references to the appeals court and trial court decisions are numbered in accordance with the pagination used in App. A and App. B. Citations to "R." refer to the record on appeal in the Eighth Circuit.

[4] In contrast, as to AFC's arbitrator, the district court found:

> Jones, on the other hand, was not involved in AFC's pre-hearing preparations. After AFC learned of Stagg's involvement and was denied discovery and a continuance, AFC asked Jones to review some deposition transcripts in an attempt to prepare for the arbitrations and in a belated attempt to level the playing field. Even then, however, Jones' role remained vastly different from that undertaken by Stagg. (App. B at p. 24a)

the course of the arbitrations Delta's attorneys hired him as their potential expert witness for another arbitration. (R. at A0988-90; R. at 0793-94) The district court found:

> Stagg and his engineering firm were heavily involved in Delta Mine's preparation for the upcoming arbitrations, both before and after the organizational meeting. Stagg attended numerous meetings, including strategy sessions, with Delta Mine's witnesses, attorneys and other personnel. During these meetings, Stagg questioned witnesses, suggested lines of question and participated in "strategy sessions." Other SESI staff members reviewed and analyzed data, prepared geologic studies, maps and exhibits which were presented as evidence at the arbitrations and assisted with the preparation of information for the witness testimony.

(App. B. at p. 23a)

In contrast to Stagg's concealment of his activities and interests, the district court found that the parties agreed at the first organizational meeting that the party-appointed arbitrators would follow the provisions applicable to non-neutral arbitrators in the *Code of Ethics for Arbitrators in Commercial Disputes*[5] ("Code of Ethics"). (App. B at pp. 39a-40a) The Code of Ethics provides for standards of disclosure for both neutral and non-neutral arbitrators, a duty to supplement such disclosures, and an obligation to determine the merits of the case "justly, exercising independent judgment." (App. B at pp. 32a-36a)

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[5] The Code of Ethics was jointly promulgated in 1977 by special committees of the American Bar Association and the American Arbitration Association. *See* MacNeil, Ian R., *et al.* 3 FEDERAL ARBITRATION LAW, § 28.4.6 (3d ed. 1994 & 1999 Supp.).

In vacating the awards, the district court held that under § 10 of the FAA and *Commonwealth Coatings* it could not confirm awards where one of the deciding votes was cast by an arbitrator whose self-evident bias and egregious pattern of concealment rendered him unable to decide the matters at issue fairly and justly, tainted the entire process and made the proceedings "fundamentally unfair":

> Stagg's initial disclosures at the organizational meeting were also misleading[6] . . . . While I believe that Stagg could have cured the misleading nature of those early disclosures, he did not do so.
>
> Stagg's creation of evidence for the arbitrations and significant consulting relationship with Delta Mine and counsel amounted to evident partiality in violation of the FAA. It strains credulity to suggest that Stagg was able to consider the evidence of record fairly during the course of deliberations (as everyone agrees that he must) when he and his firm created that evidence.

(App. B. at pp. 46a-47a)

The court of appeals *did not* upset any of these fact findings. The Eighth Circuit's panel,[7] however, reversed the district court's vacatur order on the basis that the district court had committed three errors of law in applying § 10(a)(2) of the FAA. The appellate court ruled that because the parties agreed that Stagg and Jones were selected as "partial" party arbitrators, the FAA does not require them

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[6] Stagg's disclosures are set out in App. B at p. 22a and R. at 0330.

[7] The panel consisted of one member of the Eighth Circuit and two district court judges, sitting by designation. (App. A at p. 1a)

to disclose their relationships or their interests. Instead, the court held that AFC *should have presumed* that Stagg would have the same degree of evident partiality as an officer, employee, or attorney of Delta. The court based its conclusion on its observation that the leases do not prohibit a party from nominating such persons to be party arbitrators, even though neither Stagg nor Jones were such persons. (App. A at p. 10a)

As a separate point of error, the Eighth Circuit held, without offering authority, that AFC is not entitled to vacate the awards if it did not demonstrate that Stagg's evident partiality had a prejudicial impact on the arbitration awards. (*Id.* at pp. 10a-11a)

The panel also ruled *sua sponte* that the district court committed legal error by not finding that AFC had waived the right to challenge Stagg, although no party had raised the issue of waiver to the district court or made it a point of error on appeal. (*Id.* at p. 9a)

The Eighth Circuit denied AFC's petition for rehearing *en banc*. (App. C at p. 54a)

REASONS FOR GRANTING THE PETITION

I. THE COURT OF APPEALS' INTERPRETATION OF THE FAA CONFLICTS WITH *COMMONWEALTH COATINGS*

A. *Commonwealth Coatings* Establishes A Duty Of Disclosure For All Arbitrators

The FAA provides:

> (a) In any of the following cases, the United States court in and for the district wherein the award was made may make an order vacating the

> award upon the application of any party to the arbitration --
>
> . . . .
>
> (2) Where there was evident partiality or corruption in the arbitrators, or either of them.

9 U.S.C. § 10(a)(2). (App. D at p. 60a)

In *Commonwealth Coatings*, the Court's plurality rejected any suggestion that by enacting the FAA, Congress intended to "authorize litigants to submit their cases and controversies to arbitration boards that might reasonably be thought biased against one litigant." *Id.* at 150. Recognizing the fundamental concern for the integrity of arbitrations, Justice White, in his concurring opinion, emphasized that submission to arbitration "does not mean the judiciary must overlook outright chicanery in giving effect to . . . awards." *Id.* The arbitrator's disclosure of non-trivial business interests is essential: "that fact must be disclosed." *Id.* at 151. Because the arbitrator there had failed to disclose his substantial business dealings with the prevailing party, the Court vacated the award under the "evident partiality" standard of § 10 of the FAA, even though there was no question about the arbitrator's fairness and impartiality.

In so ruling, *Commonwealth Coatings* sets a standard of disclosure that promotes the congressional intent of insuring a fair and impartial process for litigants in private arbitration and helps to avoid post-award disputes about arbitrator misconduct:

> If arbitrators err on the side of disclosure, as they should, it will not be difficult for courts to identify those undisclosed relationships which are too insubstantial to warrant vacating an award.

Id. at 152 (White, J. concurring).

Commonwealth Coatings considered the evident partiality of the third or "neutral" member of a tripartite arbitration panel. Neither *Commonwealth Coatings*, however, nor the cases that have issued in its wake, excuse a party arbitrator from the affirmative duty to fully and honestly disclose significant business interests simply because his partiality might be inferred. *See, e.g., Metropolitan Prop. & Cas. Ins. Co. v. J.C. Penney Cas. Ins. Co.*, 780 F. Supp. 885, 892 (D. Conn. 1991). The Court's reasoning applies to the selection of any arbitrator, whether disinterested or predisposed. Justice White articulated the universality of the need to disclose:

> The arbitration process functions best when an amicable and trusting atmosphere is preserved and there is voluntary compliance with the decree, without need for judicial enforcement. This end is best served by establishing an atmosphere of frankness at the outset, through disclosure by the arbitrator of any financial transactions which he has had or is negotiating with either of the parties.

Commonwealth Coatings, 393 U.S. at 151.

The Eighth Circuit concludes that because the arbitration agreement at issue does not limit the selection of party arbitrators to disinterested persons, "AFC should have *assumed* that Stagg had the same degree of 'evident partiality' as an officer, employee or attorney of Delta."[8]

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[8] The leases do not affirmatively provide, as the court of appeals decision incorrectly suggests, that interested persons shall serve as party arbitrators. *Compare* App. E at pp. 65a-66a and App. A at p. 10a. Aside from providing that all arbitrators shall be adult persons and professional mining engineers, the leases focus on the third arbitrator, expressly prohibiting nomination of an interested person. (App. E at pp. 65a-66a)

(App. B at p. 10a) (emphasis supplied) The court's assumption that the parties therefore should or will select officers, directors, or attorneys to serve as their party arbitrators is not tenable. Certainly, nothing of the kind occurred in this case. Moreover, as the district court found, Stagg and Delta worked in concert to deceive AFC about Stagg's relationship and role and to create the false impression that Stagg was something quite different from what the panel believes should have been "assumed." (App. B at pp. 45a-46a, 48a-49a, 51a, 52a)[9]

However, in seeking to draw distinctions about arbitrators, the Eighth Circuit misses the issue. Under the FAA an arbitrator is an arbitrator – the FAA makes no distinctions. Nor does the Eighth Circuit panel explain why the disclosure duties of *Commonwealth Coatings* should have any less applicability to party-appointed arbitrators. This case presents the opportunity for this Court to exercise its supervisory authority to affirm that the FAA imposes on *all* arbitrators the duty of disclosure, frankness and candor contemplated in *Commonwealth Coatings*.

B. *Commonwealth Coatings* Does Not Require Proof of Impact On The Award Where The Arbitrator Is Guilty Of Evident Partiality

The Eighth Circuit holds that to vacate an award because of a party arbitrator's evident partiality, prejudice to the outcome must be shown, even though neither *Commonwealth Coatings* nor its progeny contains such

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[9] Had Delta introduced its arbitrator as one of its officers or attorneys, AFC could easily have identified that arbitrator's duties to Delta. Instead, Delta was held out as an independent, professional mining engineer who ostensibly could perform his arbitral duties consistent with the Code of Ethics as agreed to by the parties.

restrictions. *Id.* at 151-52. *See, e.g., Schmitz v. Zilveti*, 20 F.3d 1043 (9th Cir. 1994) (vacatur required even where arbitrator unaware of undisclosed relationship). Evident partiality, going as it does to the heart of the decision making process, destroys the decisionmaker's ability to reach a fair decision or provide a fair process for all litigants. As grounds for vacating an award, the Eighth Circuit says this is not enough.

The failure to timely and accurately disclose non-trivial business or familial interests evidences "a reasonable impression of partiality" that renders the process and resulting award unfit for judicial confirmation. *Schmitz*, 20 F.3d at 1046-47. The FAA does not require a further showing of prejudice. 9 U.S.C. § 10(a)(2). The Eighth Circuit stands alone in its attempt to break with the legacy of *Commonwealth Coatings* and to twist the recognition that a party-appointed arbitrator may be predisposed into a broad exemption that frees party arbitrators to conceal their substantial interest in the dispute and sell their judgment. This is not contemplated by the language of the statute and its leading precedent:

> The view that Congress contemplated when enacting the [FAA] Act that the parties would appoint partisan arbitrators is rebutted by the express language of §10(b). That section . . . . directs that the evident partiality test should apply to every member of the panel. Charterer's argument that *Commonwealth Coatings* does not apply to the case at bar because that decision involved only the third or neutral arbitrator is without merit; neither the lead or concurring opinion delimits the holding in such a manner.

Standard Tankers (Bahamas) Co., Ltd. v. Motor Tank Vessel, AKTI, 438 F. Supp. 153, 159 (E.D. N.C. 1977).

Recognition that the party-appointed arbitrator may be predisposed "does not relieve him of the ethical obligation to act in good faith and with integrity and fairness." *Metropolitan Prop. & Cas. Ins. Co.*, 780 F. Supp. at 892. Applying *Commonwealth Coatings* to a state statute that is identical to § 10(a)(2) of the FAA, the Supreme Court of New Jersey emphasized that all arbitrators, including a party-appointed arbitrator, must act "in a quasi-judicial capacity and must render a faithful, honest and disinterested opinion upon the testimony submitted to him." *Barcon Assoc., Inc. v. Tri-County Asphalt Corp.*, 430 A.2d 214, 218 (N.J. 1981) (citations omitted).[10] It is untenable to suggest that the party arbitrator may ignore these duties. "Where an arbitrator, though appointed by the party, identifies himself personally with his party and with his party's prejudices and needs, as herein, the conclusion is unavoidable that, the arbitrator has lost sight of his duty as an arbitrator, and is unable to act as an arbitrator." *Brennan v. Stewarts' Pharmacies, Ltd.*, 579 P.2d 673, 682 (Haw. 1978) (applying vacatur statute identical to FAA).

In adding a requirement of showing prejudicial effect, the court of appeals mistakenly relies on *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753 (11th Cir. 1993), *cert. denied*, 513 U.S. 869 (1994). In *Sunkist*, the court of appeals affirmed confirmation of an arbitration

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[10] *See also Aetna Cas. & Surety Co. v. Grabbert*, 590 A.2d 88, 94-97 (R.I. 1991) (under a statute identical to § 10(a)(2) of the FAA, the party arbitrator's undisclosed contingent fee arrangement presented a direct financial interest in the award that could not be permitted; award affirmed only because party arbitrator's vote was unnecessary to outcome where other party arbitrator and neutral voted for the challenged award); *Northwest Mech., Inc. v. Public Utility Comm'n.*, 283 N.W.2d 522, 524 (Minn. 1979) (applying the FAA and *Commonwealth Coatings* to vacate award for nondisclosure of interests of party arbitrator and neutral).

award where one party arbitrator (Meyers) disclosed before the arbitration hearing his previous engagement by one of the parties to be its expert and that he intended to continue to have communications with that side. Unlike Stagg, Meyers was not shown to have "a direct financial or familial relationship with any party to the arbitration." *Id.* at 760. Further, Meyers acknowledged his obligation to act in good faith with integrity and fairness in the arbitration. *Id.* at 756. Recognizing that "[a] party-appointed arbitrator must consider the evidence of record in good faith and with integrity and fairness," the court of appeals affirmed confirmation of the award given the party arbitrator's disclosures and his lack of a direct financial or familial interest. *Id.* at 759, 760.

If a party-appointed arbitrator owes any duty of disclosure at all, then *Commonwealth Coatings* requires vacatur if the duty is breached, irrespective of whether the outcome can be shown to have been affected. By holding to the contrary, the Eighth Circuit panel rewrites the FAA and creates authority in conflict with *Commonwealth Coatings* and *Sunkist*.

C. The Eighth Circuit Improperly Considered *Sua Sponte* Whether AFC Knowingly Waived Its Objection To Stagg's Undisclosed Interests Even Though The Issue Was Waived By Delta And Not Decided By The District Court.

The panel's determination, *sua sponte*, that AFC waived the right to challenge Stagg is factually and legally incorrect. (App. A at p. 9a) In its March 31, 1998 letter, AFC asked the arbitrators to order Delta to disclose Stagg's actual activities and interests. (*Id.*; App. B at pp. 22a-23a; R. at A0898-905) AFC then knew virtually nothing about Stagg's interests. The district court was troubled by Stagg concealing his true interests while participating in the

arbitrators' decision to decline AFC's request. (App. B at p. 23a) Stagg's deceptive influence was so effective that AFC did not learn about his actual role until the limited discovery permitted by the district court. (App. B at pp. 23a-24a, 28a-32a) Decisions applying the FAA place the burden to disclose on the arbitrators because it is the parties who are prejudiced by non-disclosure. *See, e.g., Schmitz*, 20 F.3d at 1047.

Finally, the waiver issue was raised by the Eighth Circuit panel *sua sponte*. In its brief filed in the district court, Delta asserted that AFC's objections to Stagg's behavior "were specifically raised and rejected by the arbitration [p]anels." (R. at 1259) Delta did not raise waiver to the district court or as a point of error in this appeal, and, therefore, has waived this issue. *See In re Brand Name Prescription Drugs Antitrust Litig.*, 186 F.3d 781, 790 (7th Cir. 1999) (defendants "waived waiver" on appeal), *cert. denied*, 528 U.S. 1181 (2000); *Maricopa County v. American Pipe & Constr. Co.*, 431 F.2d 1145 (9th Cir. 1970) (*per curiam*) ("We see no reason to depart from the general rule that a district court judgment should not be reversed on grounds not raised below."), *cert. denied*, 401 U.S. 937 (1971).

II. THE QUESTIONS PRESENTED ARE IMPORTANT.

Commentators and courts alike have recognized that a party arbitrator often plays a unique adjudicative role. While expected or permitted to be predisposed to some degree, a party arbitrator is nonetheless expected to be governed by the same core ethical obligations as a neutral – to judge a matter fairly and with an open mind and to fully

disclose any interests so that the integrity of the arbitration process is preserved.[11] *See, e.g., Employers Ins. of Wausau v. National Union Fire Ins. Co.*, 933 F.2d 1481, 1490 (9th Cir. 1991) (party arbitrator may not come to arbitration with a "closed mind"). Although the court in *Barcon* recognized that a party arbitrator may enter the proceedings "with some sympathy for the position of the party designating him," it cautioned that:

> such an arbitrator must remain faithful to the obligation which rests upon him to maintain broad public confidence in the integrity and fairness of the (arbitration) process. . . . Most important, arbitrators should decide all matters justly, exercising independent judgment . . . All arbitrators, party-designated and neutral, must exercise their responsibilities in a manner worthy of the great trust and power placed in them.

Barcon, 430 A.2d at 219-20 (internal citations and quotations omitted).

Here, the court of appeals focused on the expectation that Stagg would be predisposed, but neglected to consider that truthful and adequate disclosures by all arbitrators, including party arbitrators, are necessary to safeguard the integrity of the process. Only if all arbitrators are candid about their relationships can the parties discern whether their expectations about the process are being met.

Because awards are not reviewable on the merits, the character, fitness and disposition of the arbitrators is always *the* critical issue in arbitration. *Employers Ins. of Wausau,*

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[11] The Code of Ethics provides precisely this. (*See* App. B at pp. 41a-45a)

933 F.2d at 1489-91. "Precisely because arbitration awards are subject to . . . judicial deference, it is imperative that the integrity of the process . . . be zealously safeguarded." *Goldfinger v. Lisker*, 500 N.E. 2d 857, 859 (N.Y. 1986). Whether arbitrators are neutral or predisposed, they still must hear the evidence, participate in deliberations, decide the case on the merits, and make discovery and procedural rulings to assure that parties enjoy a fair process. As the Eleventh Circuit emphasized in *Sunkist*: "A party-appointed arbitrator must consider the evidence of record in good faith and with integrity and fairness." 10 F.3d at 760. Losing is acceptable only if the process is perceived as fair. Allowing concealment of relationships and interests only heightens suspicions about the fairness of the process – as was evidenced and warranted in this case.

The rule created by the Eighth Circuit bucks the trend of modern arbitration law and policy both in this country and internationally. As one commentator observed: "Party-appointed arbitrators in international proceedings, including those conducted in the United States, subscribe in principle to essentially the same standards of independence and impartiality as do arbitrators selected by arbitral institutions or by the parties jointly."[12] Arbitration procedures in this country are moving toward the international model. For example, although individual state arbitration acts typically differ from the FAA by expressly limiting the evident partiality standard to neutral arbitrators, the Uniform Arbitration Act on which the majority of the state arbitration statues is patterned was recently amended to include the very disclosure standards established 33 years ago by this Court in

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[12] Carter, James H., *Improving Life With the Party-Appointed Arbitrator: Clearer Conduct Guidelines for "Nonneutrals."* 11 AM. REV. INT'L. ARB. 295 (2000).

Commonwealth Coatings. The revisions, already adopted by four states and introduced as legislation in fourteen others, impose on all arbitrators – including party-appointed – the same duty to fully disclose their interests before accepting appointment.[13]

Private commercial arbitration often is conducted utilizing the tripartite model found in this case, whereby the arbitrators selected by the parties in turn select a third, completely disinterested arbitrator.[14] While these arrange-

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[13] Section 12 of the Revised Uniform Arbitration Act provides:

> DISCLOSURE BY ARBITRATOR.
>
> (a) Before accepting appointment, an individual who is requested to serve as an arbitrator, after making a reasonable inquiry, shall disclose to all parties to the agreement to arbitrate and arbitration proceeding and to any other arbitrators any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator in the arbitration proceeding, including:
>
> (1) a financial or personal interest in the outcome of the arbitration proceeding; and
>
> (2) an existing or past relationship with any of the parties to the agreement to arbitrate or the arbitration proceeding, their counsel or representatives, a witness, or another arbitrators.
>
> (b) An arbitrator has a continuing obligation to disclose to all parties to the agreement to arbitrate and arbitration proceedings and to any other arbitrators any facts that the arbitrator learns after accepting appointment which a reasonable person would consider likely to affect the impartiality of the arbitrator.

Revised Uniform Arbitration Act, U.L.A. § 12 (2000).

[14] Rogers, Stephen C., *Can Tripartite Arbitration Panels Reach Fair Results?* DISPUTE RESOLUTION MAGAZINE 27 (Fall 2001). Stipanowich, Thomas J., ed., COMMERCIAL ARBITRATION AT ITS BEST

(continued...)

ments are open to abuse, rarely do the resulting facts approach the level of chicanery found by the district court in this case. The Eighth Circuit decision sets down a rule of nondisclosure that not only condones such mischief, but also institutionalizes it. Under this rule, a party arbitrator who agrees to be compensated according to the results he achieves for his appointing party owes no duty to divulge the arrangement. Litigants are forced to assume, exactly as the Eighth Circuit here says they should, that the other party arbitrator is simply their opponent's mouthpiece. In this cynical environment, what party could afford the luxury of selecting an arbitrator with integrity.

In reaching its decision, the Eighth Circuit fashions troubling precedent that invites the very deception which arbitrator Stagg employed, and punishes parties whose arbitrator will not allow his judgment to be compromised. Resolving the questions raised by this decision is important to litigants, arbitrators and the integrity of the arbitration process.

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94 (2001) ("Tripartite panels involving party-appointed arbitrators, long the norm in international arbitration, are also a common feature of commercial arbitration between U.S. parties.").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: May 21, 2002

APPENDIX

APPENDIX A

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 00-3646

Delta Mine Holding Company; Meadowlark, Inc.,

Appellants,

v.

AFC Coal Properties, Inc.,

Appellee.

Appeal from the United States District Court
for the Eastern District of Missouri

Submitted: June 14, 2001
Filed: December 28, 2001

Before LOKEN, Circuit Judge, ROSENBAUM* and DAWSON,** District Judges.

LOKEN, Circuit Judge.

Delta Mine Holding Company ("Delta Mine") petitioned the district court to confirm, and AFC Coal Properties, Inc.

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* The HONORABLE JAMES M. ROSENBAUM, Chief Judge of the United States District Court for the District of Minnesota, sitting by designation.

** The HONORABLE ROBERT T. DAWSON, United States District Judge for the Western District of Arkansas, sitting by designation.

("AFC"), petitioned the district court to vacate, two arbitration awards resolving disputes over Delta Mine's right to terminate coal mining lease agreements. The district court vacated the awards because of the partiality and misconduct of the non-neutral arbitrator chosen by Delta Mine. Delta Mine appeals, raising difficult issues concerning how the grounds for vacating an award under the Federal Arbitration Act, 9 U.S.C. § 10(a)(1)-(3), should be applied to party-selected arbitrators. Delta Mine seeks confirmation of one award, and modification of the other to eliminate an offset provision favorable to AFC. AFC defends the district court's decision and also urges us to affirm on any of several alternative grounds not reached by the district court. We conclude that the conduct of Delta Mine's party arbitrator does not warrant vacating the awards. We further conclude that AFC's other arguments for vacating the awards, and Delta Mine's argument that one award should be modified, are without merit. Accordingly, we reverse and remand with directions to confirm both awards.

I. BACKGROUND

In 1980, the predecessors of Delta Mine and AFC entered into long-term leases for the mining of coal on AFC lands in Illinois. The parties refer to these agreements as the Williamson County and the Saline County leases.[1] Complex provisions permitted Delta Mine to terminate each lease upon notice to AFC that all "Economically Recoverable Coal" had been mined. Paragraph 8.2 provided that disputes over this provision were subject to arbitration by a panel of three arbitrators, one selected by Delta Mine, one by AFC, "and a third selected by the other two arbitrators in accordance with the then applicable rules of the American Arbitration Association." Paragraph 8.3

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[1] The leases were signed by The Penn Central Corporation as lessor and by Meadowlark Farms, Inc., as lessee. Meadowlark was a subsidiary of AMAX Inc., a large diversified mining company.

provided that "each of the arbitrators . . . shall be a professional mining engineer, or firm of professional mining engineers," and that the third or neutral arbitrator may not be "an officer, employee or shareholder of, attorney or auditor to, or otherwise interested in" either party or the matter to be arbitrated.

In November 1995, Delta Mine invoked the termination provision in each lease. AFC objected, and these two arbitration proceedings followed. Delta Mine designated as its party arbitrator the consulting engineering firm of Stagg Engineering Services Inc. and its principal, Alan Stagg. AFC designated mining engineer Paul Jones. Stagg and Jones selected mining engineer John Wilson as the neutral arbitrator for the Williamson County arbitration and mining engineer Eugene Kitts as the neutral arbitrator for the Saline County arbitration.

The two arbitration panels held a joint organizational meeting on November 24, 1997, attended by the four arbitrators, the parties, and their attorneys. At the suggestion of arbitrator Jones, each arbitrator briefly described his background. Stagg stated that he had maintained a client consulting relationship with Delta Mine's predecessors since 1981, that he had never worked with Delta Mine's law firm, and that he had previously met the neutral arbitrators. There followed a discussion of when the hearings should be held. The neutral arbitrators overruled AFC's objection to joint proceedings, concluding that the two panels would hold a joint hearing on common issues, followed by separate hearings on issues unique to each arbitration. Delta Mine urged an expedited process – informal exchanges of documents and witness statements followed by hearings in late January 1998. AFC argued for a more lengthy process, including formal document discovery and depositions "because they have all the information and they have all the witnesses." After the arbitrators conferred, neutral arbitrator Kitts announced the pre-

hearing schedule – document discovery during December and January, depositions during February, and the hearings during the week of March 23, 1998. Over AFC's strenuous objection, arbitrator Kitts ruled "that the two partial panel members [Stagg and Jones] should be in a position to ask the pertinent questions of the witnesses, rather than having it turn into a more formal judicial [proceeding] with cross-examinations and so forth."

Not surprisingly, the ambitious discovery schedule was later extended. On March 31, 1998, after deposing Delta Mine witnesses, AFC's counsel wrote the arbitrators complaining that Delta Mine's party arbitrator, Alan Stagg, had been present at Delta Mine's witness preparation and strategy sessions and was acting as Delta Mine's expert in preparing witnesses for depositions and the hearings. AFC expressed concern whether an arbitrator who invests himself deeply in the preparation of a case, and then becomes the chief interrogator for his side at the hearing, can be reasonably expected to judge a case on its merits as called for by the *Code of Ethics for Arbitrators in Commercial Disputes*.[2] AFC concluded by requesting a brief postponement of perhaps a few weeks, to a convenient date in May, to allow each side a reasonable opportunity to prepare.

On April 13, 1998, the two panels responded. In a letter ruling signed by each of the four, the arbitrators rescheduled the hearings to the first week in May. As a "compromise" between AFC's request for full attorney cross-examination of witnesses and the arbitrators' intent "that this arbitration should not become a formal judicial exercise," the panels ruled that only the arbitrators would be permitted to question witnesses during the presentation of their testimony, but the panels would

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[2] Hereinafter referred to as the "Code of Ethics." The Code of Ethics was prepared in 1977 by a joint committee of the American Arbitration Association and the American Bar Association.

receive follow-up questions, comments, and requests for clarification from counsel following each witness's presentation. (As the hearings later progressed, AFC's counsel was permitted to cross-examine Delta Mine's witnesses.)

The April 13 letter ruling did not address AFC's concern over Stagg's role in assisting Delta Mine with the preparation of its case. However, on April 8, AFC's party arbitrator, Paul Jones, had sent AFC's attorneys a long memorandum describing a two-hour meeting of the arbitrators. Jones reported:

> **ROLE OF PARTY ARBITRATOR AT HEARING:** It was the opinion or expectation of the two Neutral Arbitrators that each Party Arbitrator would serve to question witnesses to bring out issues which were not clear in the witness presentations. To do this, the Neutrals expect the Party Arbitrator to be adequately briefed to know where the testimony is going and to be able to ask questions for clarification, etc. They did not seem 'taken back' by Alan Stagg's attendance at the prep sessions.
>
> * * * * *
>
> **[JONES] COMMENTS:** Gentlemen, I know you are not happy with the results of today's meeting but I am certainly willing to do what I can to make the hearing effective for your position. . . . I would suggest if you could Fed Ex to me (home delivery Saturday) as much material regarding the depositions, your expert witness concepts, etc. as possible. I can then spend this weekend and early next week reviewing the material. . . . If [the hearing] is not delayed, we need to discuss ASAP when I might be briefed on your side of the issues so that I can do a decent job in raising questions at the hearings.

Following the hearings, the two panels began their separate deliberations. In the district court, AFC conducted thorough discovery of party arbitrator Stagg, but neither party conducted discovery of party arbitrator Jones or the neutral arbitrators. Thus, the record provides a substantial but incomplete picture of the deliberations. We know that each neutral arbitrator discussed the issues with Stagg and Jones, prepared a draft award and circulated it to the party arbitrators for comment, and after further deliberations prepared the final award. Neutral arbitrator Wilson ruled that Delta Mine was entitled to terminate the Williamson County lease under the Economically Recoverable Coal provision but awarded AFC an offset based upon amounts Delta Mine had received from its coal customer for future mining royalties. Party arbitrator Stagg concurred in the termination ruling but dissented from the offset award, while party arbitrator Jones dissented from the termination ruling but concurred in the offset award. In the other arbitration, neutral arbitrator Kitts ruled that Delta Mine was entitled to terminate the Saline County lease. Arbitrator Stagg concurred in this award; arbitrator Jones dissented.

AFC then petitioned the district court to vacate both awards. Delta Mine petitioned to confirm the Saline County award and to modify the Williamson County award. The district court vacated both awards based upon the following misconduct by Delta Mine's party arbitrator Stagg:

- Stagg's failure to fully disclose his substantial and ongoing relationship with Delta Mine and its attorneys, including his consulting relationship in these proceedings.

- The substantial role played by Stagg and his firm in helping Delta Mine prepare for the arbitration hearings, including Stagg's participation in a mock arbitration held days before the hearings.

- Stagg's disclosure of the ongoing panel deliberations to Delta Mine and his communications with Delta Mine and its attorneys concerning "how to sway the arbitrators to rule in Delta Mine's favor."[3]

Accepting AFC's view of the legal issues, the district court discussed at length how Stagg's conduct violated the Code of Ethics and then asserted in conclusory fashion that such misconduct justified vacating the awards under § 10(a) of the Federal Arbitration Act. On appeal, Delta Mine argues that the district court erred in placing undue emphasis on the Code of Ethics and in applying the statutory grounds for vacating arbitration awards found in § 10(a) of the Act.

II. DISCUSSION

Though arbitration has been present in America as a form of dispute resolution since the eighteenth century, the Federal Arbitration Act of 1925 firmly established a "national policy favoring arbitration." *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984). Under that Act, "the grounds for challenging an arbitration award are narrowly limited, reflecting the voluntary contractual nature of commercial arbitration." *IDS Life Ins. Co. v. Royal Alliance Assoc., Inc.*, 266 F.3d 645, 649 (7th Cir. 2001). As relevant to this case, § 10(a) of the Act authorizes a reviewing court to vacate an arbitration award:

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[3] Stagg communicated with Delta Mine's counsel at several points during the deliberations and sought the advice of Delta Mine's counsel, particularly regarding neutral arbitrator Wilson's unexpected proposed offset in the Williamson County award. It is apparent that neutral arbitrator Wilson was aware of and encouraged at least some of these communications. But in the district court's view, Stagg's disclosures "destroy[ed] the confidentiality of the panels' deliberations" and "manipulate[d] the process to Delta Mine's advantage."

> (1) Where the award was procured by corruption, fraud, or undue means.
>
> (2) Where there was evident partiality or corruption in the arbitrators, or either of them.
>
> (3) Where the arbitrators were guilty of . . . any other misbehavior by which the rights of any party have been prejudiced.

In this case, the lease agreements provided that arbitration proceedings shall "comply with the then applicable rules of the American Arbitration Association." However, the district court focused on whether party arbitrator Stagg violated the Code of Ethics, not the AAA's Commercial Arbitration Rules. The Code of Ethics provides that it "does not form a part of the arbitration rules of the American Arbitration Association," nor does it "establish new or additional grounds for judicial review of arbitration awards." It is well-settled that only the statutory grounds in § 10(a) of the Act justify vacating an award; arbitration rules and ethical codes "do not have the force of law." *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 680 (7th Cir.), *cert. denied*, 464 U.S. 1009 (1983); *see Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145, 149 (1968); *Montez v. Prudential Sec., Inc.*, 260 F.3d 980, 984 (8th Cir. 2001). Thus, the district court erred in placing primary emphasis on whether party arbitrator Stagg violated various provisions of the Code of Ethics. "Unless there is a specific [statutory] ground for vacating an award, it must be confirmed." *IDS Life Ins.*, 266 F.3d at 650; *see ANR Coal Co., Inc. v. Cogentrix of N.C.*, 173 F.3d 493, 499 (4th Cir.), *cert. denied*, 528 U.S. 877 (1999). We therefore focus exclusively on those statutory grounds.

1. Section 10(a)(2) – "Evident Partiality." The district court ruled that Stagg's on-going consulting relationship with Delta Mine and its attorneys, his participation in the pre-

hearing preparation of Delta Mine's case, and his communications with Delta Mine and its attorneys during the panels' deliberations constituted "evident partiality" requiring that the awards be vacated under § 10(a)(2). In one sense, the district court's ruling was factually accurate – Stagg was obviously partial, and his conduct during the course of the arbitrations was clearly inconsistent with the impartiality required of a neutral arbitrator in numerous cases such as the Supreme Court's *Commonwealth Coatings* decision. But whether we view the ruling as a finding of fact or a conclusion of law, it cannot be upheld because the court committed three errors of law in applying § 10(a)(2):

First, AFC waived this contention by failing to raise it to the arbitrators. AFC learned of Stagg's on-going participation in the preparation of Delta Mine's case well before the hearings. AFC expressed concern to the arbitrators, but only in the context of requesting a delay in the hearings (which was granted). AFC did not request Stagg's removal. Even when a neutral arbitrator is challenged for evident partiality, the issue is deemed waived unless the objecting party raised it to the arbitration panel. *See Kiernan v. Piper Jaffray Cos.*, 137 F.3d 588, 593 (8th Cir. 1998). This rule furthers the policy of judicial deference to voluntary contractual arbitration:

> It does not seem that general statutory language calling for the arbitrators to be impartial should be interpreted as refusing enforcement to the awards of arbitrations in which the parties contract for partisanship or waive objections to partiality. An interpretation under which a party could wait until it lost and then successfully raise the objection of partiality should be avoided.

Note, *The Use of Tripartite Boards in Labor, Commercial, and International Arbitration*, 68 HARV. L. REV. 293, 325 (1954).

Second, had AFC timely requested Stagg's removal on the ground of evident partiality, the request would have been denied as contrary to the parties' agreements to arbitrate. "Generally, partisan arbitrators are permissible." *ATSA of Cal., Inc. v. Continental Ins. Co.*, 754 F.2d 1394, 1395 (9th Cir. 1985). Here, the lease agreements authorized the selection of a party arbitrator who is "an officer, employee or shareholder of, attorney or auditor to, or otherwise interested in, either of the Parties or the matter to be arbitrated." In other words, the arbitration agreements expressly contemplated the selection of partial arbitrators – persons with substantial financial interests in and duties of loyalty to one party. "The parties to an arbitration choose their method of dispute resolution, and can ask no more impartiality than inheres in the method they have chosen." *Merit Ins.*, 714 F.2d at 679.

AFC counters by arguing, without citation to pertinent authority, that party arbitrator Stagg's failure to fully disclose the extent of his relationship with Delta Mine and its attorneys constitutes evident partiality for purposes of § 10(a)(2). We disagree. At the organizational meeting, Stagg disclosed that "I've had a client consultant relationship with [Delta Mine's predecessor] since probably 1981, '82, somewhere in there." AFC should have assumed that Stagg had the same degree of "evident partiality" as an officer, employee, or attorney of Delta Mine, persons the lease agreements expressly authorized to be party arbitrators. Moreover, because the leases authorized the selection of partial party arbitrators, Stagg would have perceived no apparent need to disclose more than his long-standing "client consultant relationship," absent a direction from the neutral arbitrators to do so.

Third, AFC failed to show that Stagg's "evident partiality" had a prejudicial impact on the arbitration awards. When a neutral arbitrator fails to disclose a relationship with one party that casts significant doubt on the arbitrator's impartiality, as in

Commonwealth Coatings, it is appropriate to assume that the concealed partiality prejudicially tainted the award. But where the parties have expressly agreed to select partial party arbitrators, the award should be confirmed unless the objecting party proves that the party arbitrator's partiality prejudicially affected the award.

In this case, AFC failed to show that the neutral arbitrators were deceived or misled by party arbitrator Stagg's partiality. During the initial organizational meeting, neutral arbitrator Kitts referred to the party arbitrators as "partial."[4] The neutral arbitrators ruled that the party arbitrators, not the parties' attorneys, would question witnesses at the hearings. When AFC complained that party arbitrator Stagg was participating in the preparation of Delta Mine's case, the neutral arbitrators were not "taken back" because they wanted the party arbitrators fully prepared to question witnesses at the hearings. During deliberations, the neutral arbitrators dealt with the party arbitrators as advocates for their respective positions, precisely as one would expect from the terms of the agreements to arbitrate. So long as the neutral arbitrators were not deceived -- an issue AFC did not pursue in the district court[5] -- there was nothing insidious about this process. As Judge Posner observed in *IDS Life Ins.*, 266 F.3d at 651, "Arbitration is customized, not off-the-rack, dispute resolution."

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[4] The Commercial Arbitration Rules provide that, absent an agreement to the contrary, party-appointed arbitrators are presumed to be non-neutral. *See* AMERICAN ARBITRATION ASSOCIATION, COMMERCIAL ARBITRATION RULES § 12 (1996).

[5] Though the district court's discovery order authorized inquiry into "the arbitration panels' understanding of arbitrator Stagg's role" and whether Stagg had influenced the proceedings in an improper manner, AFC did not depose the neutral arbitrators to explore these issues.

Nor did AFC prove that its ability to prepare and present its case was prejudiced by Stagg's role as a partial party arbitrator. AFC knew from the agreements to arbitrate that the party arbitrators would be partial in the conflict-of-interest sense of that word. At the organizational meeting, AFC learned that the party arbitrators would question witnesses at the hearings. Weeks before the hearings, AFC learned that Stagg was helping Delta Mine prepare its case. Thus, AFC had ample time to prepare its party arbitrator to play a comparable role. As the Eleventh Circuit said in *Sunkist Soft Drinks v. Sunkist Growers*, 10 F.3d 753, 759 (11th Cir. 1993), *cert. denied*, 513 U.S. 869 (1994), a non-neutral party arbitrator's conduct in participating in meetings with witnesses, suggesting lines of testimony, helping select consultants, and advising an expert witness as to his testimony is "not only unobjectionable, but commonplace."

2. Sections 10(a)(1) and (3) -- "undue means" and "misbehavior." The district court also ruled that the awards must be vacated because Stagg's conduct before the hearings and during deliberations constituted "undue means" and "misbehavior by which [AFC's rights were] prejudiced" within the meaning of §§ 10(a)(1) and (3). A party seeking vacation of an award on either of these grounds must demonstrate that the conduct influenced the outcome of the arbitration. *See Painewebber Group v. Zinsmeyer Trust Partnership*, 187 F.3d 988, 994 (8th Cir. 1999), *cert. denied*, 529 U.S. 1020 (2000) ("there must be some causal relation between the undue means and the arbitration award."); *M&A Elec. Power Coop. v. Local Union No. 702, IBEW*, 977 F.2d 1235, 1238 (8th Cir. 1992). Once again, AFC failed to sustain its burden on this issue.

AFC argues that Stagg disclosed to Delta Mine the substance of the panels' deliberations and the neutral arbitrators' draft decisions, and obtained input from Delta Mine before responding to neutral arbitrator Wilson's proposed

offset. But there is no evidence that this was contrary to what the neutral arbitrators expected and encouraged, and there is considerable evidence that party arbitrator Jones knew the role Stagg was playing and had equal access to his client and to the neutral arbitrators, for example, on the offset issue. We know that the neutral arbitrators' final awards were consistent with their draft decisions, so Stagg failed to dissuade arbitrator Wilson from awarding AFC an offset in the Williamson County award. AFC failed to satisfy its substantial burden to "demonstrate that the conduct influenced the outcome of the arbitration." *M & A Electric*, 977 F.2d at 1238; *see Painewebber*, 187 F.3d at 994-95.

*3. **AFC's Alternative Grounds.*** AFC argues that the awards should be vacated because the arbitrators improperly consolidated two separate arbitrations, disallowed cross-examination of witnesses, refused to hear new evidence, ignored key lease provisions, and issued awards that are irrational on their face. Having carefully reviewed the arbitration records, we conclude these contentions are without merit. Arbitration awards should be construed, whenever possible, so as to uphold their validity. "A contrary course would be a substitution of the judgment of the chancellor in place of the judges chosen by the parties, and would make an award the commencement, not the end, of litigation." *Burchell v. March*, 58 U.S. (17 How.) 344, 349 (1854). The arbitrators' rulings were well within their procedural discretion,[6] their analysis drew its essence from the lease agreements, and we are satisfied that the awards were not "completely irrational" and

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[6] "Arbitration may or may not be a desirable substitute for trials in courts; as to that the parties must decide in each instance. But when they have adopted it, they must be content with its informalities; they may not hedge it about with those procedural limitations which it is precisely its purpose to avoid." *American Almond Prods. Co. v. Consolidated Pecan Sales Co.*, 144 F.2d 448, 451 (2d Cir. 1944).

did not "evidence[ ] a manifest disregard for the law." *Kiernan*, 137 F.3d at 594.

4. Delta Mine's Petition To Modify. Delta Mine argues that the Williamson County award must be modified because neutral arbitrator Wilson exceeded his authority by including an offset in favor of AFC. Although an arbitration award may be modified to eliminate mistakes affecting the merits of the controversy "[w]here the arbitrators have awarded upon a matter not submitted to them," 9 U.S.C. § 11, we are satisfied the offset was fairly within the controversy submitted to the Williamson County panel. We decline Delta Mine's further invitation "to invade the province of the panel and re-adjudicate this [portion of the] dispute on its merits." *UHC Mgmt. Co. v. Computer Sciences Corp.*, 148 F.3d 992, 998 (8th Cir. 1998).

III. CONCLUSION

For the foregoing reasons, we conclude that neither party arbitrator Stagg's conduct nor the other grounds urged on appeal warrant either vacating or modifying the arbitration awards. The parties expressly agreed to the selection of partisan party arbitrators. Arbitrators Stagg and Jones were selected and performed accordingly, and courts have long upheld awards by tripartite arbitration panels consisting of two non-neutral party arbitrators and one neutral decision-maker. *See generally* Note, 68 HARV. L. REV. at 296-310.

It may be that many professional neutral arbitrators, if presented with this situation, would have required fuller initial disclosures by the party arbitrators and would have established clearer and better articulated procedural ground rules for the pre-hearing preparations and the post-hearing deliberations. But consistent with the agreements to arbitrate, the neutral arbitrators in this case were mining engineers, not professional arbitrators. Each announced at the organizational meeting that he had not previously served as a neutral arbitrator. Because

arbitration is a matter of contract, we neither endorse nor condemn this mode of proceeding (though the litigation it has produced is certainly unfortunate). We merely hold that, because AFC failed to demonstrate that arbitrator Stagg's conduct either misled the neutral arbitrators, prevented AFC from fairly presenting its case, or otherwise prejudiced the outcome of the arbitrations, the awards must be confirmed. The judgment of the district court is reversed and the case is remanded with instructions to confirm the Williamson County and Saline County awards in their entirety.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

DELTA MINE HOLDING COMPANY, *et al.*,

Petitioners,

v.

AFC COAL PROPERTIES, INC.,

Respondent.

AFC COAL PROPERTIES, INC.,

Petitioner,

v.

DELTA MINE HOLDING COMPANY, et al.,

Respondents.

Filed: September 28, 2000
U.S. District Court Eastern District of MO
St. Louis

No. 4:98MC239 CDP
No. 4:98MC277 CDP
Consolidated

MEMORANDUM AND ORDER

I. *Introduction*

Delta Mine and AFC arbitrated complex disputes regarding coal leases before two arbitration panels. Each party selected one arbitrator, and those party arbitrators picked the third member of each panel. In these consolidated cases Delta Mine seeks to confirm the two awards and modify one of them, having obtained substantial victory in the arbitrations. AFC seeks to vacate the awards, claiming misconduct by Delta Mine's party arbitrator.

Delta Mine treated its party arbitrator as a member of its trial team, and so he was involved in pre-arbitration strategy sessions, witness and exhibit preparation, and a mock arbitration. Once the arbitration panels began deliberations, he provided detailed descriptions to Delta Mine's attorneys of the panels' discussions. He sent the neutral arbitrator's draft decision for one of the arbitrations to Delta Mine's counsel, and then, following suggestions from counsel, made recommendations back to the neutral arbitrator regarding the final decision. He provided almost a month's advance notice of the other panel's decision to Delta Mine, so that Delta Mine could stop making payments to AFC in anticipation of the favorable decision.

AFC and its party arbitrator treated his role quite differently. AFC's party arbitrator did not plan strategy with the lawyers, meet with the witnesses or prepare exhibits, and did not disclose anything about the arbitration deliberations to AFC or its counsel. AFC's arbitrator did read some witness depositions, but did not do this until -- about a month before the arbitration hearings began -- AFC learned that Delta Mine's arbitrator had attended witness preparation meetings.

I find that the conduct of Delta Mine's arbitrator went far beyond the parties' agreements and the proper role of a party-appointed arbitrator, and rendered the proceedings unfair. Because I find that his misconduct substantially prejudiced the arbitration, I will vacate both awards.

A. *Background Facts*

This action involves a commercial dispute arising under two coal leases between Penn Central, the lessor and predecessor-in-interest to AFC, and the lessee, Meadowlark Farms, Inc. Meadowlark was a subsidiary of Amax, Inc. In 1995, Amax merged with another corporation to form Cyprus Amax. Meadowlark subleased certain interests in and to these leases to operating companies affiliated with Cyprus Amax. Delta Mine is the assignee of Meadowlark's and Amax's interests in the arbitration claim. For ease of reference I will refer to the parties to the arbitration as Delta Mine and AFC.

In November of 1995, Meadowlark notified Penn Central of its intent to suspend its coal leases by sending three separate notices, each invoking a distinct provision of the lease agreement. The parties subsequently selected three arbitration panels to hear and decide these three disputes.

Article Eight of the lease agreements governs the arbitration of disputes as follows:

> 8.2 *Arbitration.* Any dispute required to be resolved by arbitration under Section 8.1 hereof shall, upon the written demand of either Party to the other therefor, be submitted to the arbitration of three arbitrators, one selected by Lessor, one by Lessee, and a third selected by the other two arbitrators in accordance with the then applicable rules of the American Arbitration Association. If either Party fails to select an arbitrator within 15 days after the other has given such written

> demand, naming its arbitrator therein, or if the two arbitrators, selected as provided herein, fail to select a third within 20 days after the appointment of the second of them, then in the first instance the Party having named its arbitrator and in the second instance either or both of the Parties may apply to the Senior Judge then sitting on the United States District Court for the Southern District of Illinois, to select such arbitrator for the other Party or such third arbitrator, as the case may be; and if said Judge declines to make such selection, such Party or Parties may apply to the American Arbitration Association to make such selection, in accordance with the rules and regulations thereof.
>
> 8.3 *Qualification of Arbitrators.* Any adult person shall be qualified to be an arbitrator hereunder; provided, however, that no person shall be eligible for appointment as the third arbitrator if such person is an officer, employee or shareholder of, attorney or auditor to, or otherwise interested in, either of the Parties or the matter to be arbitrated hereunder; provided, further, that each of the arbitrators in any dispute to be resolved by arbitration...shall be a professional mining engineer, or firm of professional mining engineers....

By November of 1997, AFC had selected Paul Jones to serve as its party-appointed arbitrator on all three panels. Delta Mine named Stagg Engineering Services, Inc. (SESI), a mining engineering firm of which Alan Stagg is the principal, as its party-appointed arbitrator. Although the record is unclear on this point, Delta Mine eventually began referring to Stagg, not SESI, as its party-appointed arbitrator. Stagg and Jones then agreed on Eugene Kitts to serve as the neutral for the Saline

County arbitration and John Wilson for the Williamson County arbitration.[1]

The parties held an organizational meeting for the arbitrations on November 24, 1997. Because all of the arbitrators were present, AFC stated for the record that the arbitrations were separate and should be discussed independently. Despite AFC's objection, the arbitrators decided to hold a joint organizational meeting and to hear evidence on overlapping issues in both arbitrations in a single proceeding. During this meeting, the arbitrators also decided (again, over AFC's objections) that the witnesses should deliver their testimony in a report-style format, with questioning to be done by the party-appointed arbitrators rather than the attorneys. AFC objected, "[b]ecause we will be the ones in the best position to do that cross-examination. That's with all due respect to the party arbitrators who have not had the benefit of all the work and dealing with the experts as we have." Despite this initial ruling, however, counsel were ultimately afforded full opportunity to conduct cross-examination at the arbitrations.

At the outset of the organizational meeting, Jones asked the parties which rules governed the arbitrators' conduct. In response to that question, AFC's counsel presented the arbitrators a copy of the Commercial Arbitration Rules of the American Arbitration Association and the accompanying Code of Ethics for Arbitrators in Commercial Disputes and said:

> The commercial arbitration rules of the Triple A and then -- those rules, in turn, incorporate the code of

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[1] The third arbitration concerning the suspension notice for the Williamson County lease never took place. On April 1998, Stagg withdrew as the party-appointed arbitrator for Delta Mine on conflict grounds and Delta Mine never named his successor.

> ethics for arbitrator in commercial disputes. So I've taken the liberty of attaching those as well. They are -- in any event, whether they're binding or not, guidance used by various courts in determining arbitrators' responsibilities as far as ethical obligations are concerned. And so we've packaged them together just so you have them.

Neither Stagg nor Delta Mine objected to this statement or challenged the applicability of the Code of Ethics to the arbitrators' conduct. Jones also suggested that the arbitrators disclose any "present or former associations any of us might have had" with the parties. Although Delta Mine protested that the disclosures were unnecessary, AFC disagreed:

> Again, the -- the rules generally provide, and that's one of the reasons for providing the panel -- all the members of the panel with this code of ethics, is that the arbitrators are -- we have a duty under those rules to disclose any relationships which could be deemed to affect their impartiality, particularly with respect to the umpires, and carefully disclose any other relationships that could give the appearance of a lack of impartiality. And that -- that duty is an ongoing one from the beginning until the very end of the arbitration. Something that comes to mind later on that is material information that should be disclosed. It ought to be disclosed. All of us want to feel secure that we are going to proceed from beginning to end here and not have to worry about the validity of the proceedings. So I'm just trying to get it on the table and make sure the arbitrators were familiar with some of the guiding principles and leave it up to them to meet their responsibility in whatever fashion they deem appropriate, whether it's today by oral disclosure, or by letter, if that's appropriate.

Jones told the parties that he served as a party arbitrator for AFC in 1991 or 1992 and that he had no other business dealings with them or the people involved. Stagg, in turn, stated:

> I've been a consultant and I've had a client consultant relationship with Cyprus since probably 1981, '82, somewhere in there, and have done work for Amax in the past when they existed as a separate entity. I never worked with [Crowell and Moring, the law firm representing Delta Mine] before.

Stagg did not disclose that his firm had been engaged as a consultant by Cyprus and its predecessors on between 12 to 50 separate occasions since the early 1980s, four of which occurred after the Cyprus/Amax merger took place in 1995. Stagg also failed to disclose that, before the meeting, he had actually entered into a Professional Services Agreement with Crowell and Moring to provide "geologic consulting services" for a project described as "Arbitration Services Coal Lease Issues."[2]

During depositions in March of 1998, AFC discovered that Stagg was involved in the preparation of Delta Mine's case. Delta Mine refused to allow the deponents to describe Stagg's involvement in any of these activities on the ground of privilege. Therefore, on March 31, 1998, AFC sent a letter to the arbitration panels describing what it then knew of Stagg's participation in the arbitration proceedings (which it viewed as improper) and requesting a continuance on this basis. AFC also requested that the panels allow AFC to delve into the full nature and extent of Stagg's involvement in pre-hearing

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[2] On April 2, 1998, Crowell and Moring engaged SESI and Stagg as its consultant on another arbitration project, but this fact was never disclosed during the arbitrations, either.

proceedings and his ongoing relationship with Delta Mine. The panels, with Stagg participating, declined to compel discovery. Moreover, the neutral arbitrators did not ask Stagg to describe his involvement in pre-hearing activities. The panels also declined AFC's request for continuance.

Discovery in this case has revealed that Stagg and his engineering firm were heavily involved in Delta Mine's preparation for the upcoming arbitrations, both before and after the organizational meeting. Stagg attended numerous meetings, including strategy sessions, with Delta Mine's witnesses, attorneys and other personnel. During these meetings, Stagg questioned witnesses, suggested lines of questioning and participated in "strategy sessions." Other SESI staff members reviewed and analyzed data, prepared geologic studies, maps and exhibits which were presented as evidence at the arbitrations and assisted with the preparation of information for the witness testimony. As of the end of March, SESI's total fees and charges to Crowell and Moring for the arbitration work exceeded $87,000. It is undisputed that Stagg never disclosed his involvement in the pre-hearing preparations until AFC stumbled upon this information during depositions.

Only days before the telephone conference discussing AFC's request for discovery and a continuance, Stagg and other SESI staff members participated in a two-day mock arbitration at Delta Mine's headquarters in Denver. After the panels rejected AFC's request for discovery into Stagg's participation in the pre-hearing sessions, SESI personnel inspected and viewed the mining property at issue, met with mine personnel, took photographs, located additional information and documents and prepared witnesses for the upcoming hearings.

By the arbitration hearing, SESI's charges to Crowell and Moring exceeded $155,000.[3]

Jones, on the other hand, was not involved in AFC's pre-hearing preparations. After AFC learned of Stagg's involvement and was denied discovery and a continuance, AFC asked Jones to review some deposition transcripts in an attempt to prepare for the arbitrations and in a belated attempt to level the playing field. Even then, however, Jones' role remained vastly different from that undertaken by Stagg.

The arbitration hearings were held on May 1 and May 3-6, 1998. At the panel's directive, the proceedings began (over AFC's objection) with a joint hearing on the "common issues" which lasted three days. Following the joint proceeding, each panel separately spent one day hearing additional evidence. Following the hearings, the Williamson County panel indicated its intention to reach a decision by mid or late summer, following the receipt of post-hearing briefs from the parties and additional submissions from Stagg and Jones.

Stagg, Jones and the neutral arbitrator Wilson met on June 30, 1998 to begin their deliberations on the Williamson County arbitration. On July 7 Stagg faxed an eight-page memorandum to Delta Mine and its counsel (Document 1205-1215),[4] which set out in detail the contents of the panel's discussions. He repeated the neutral Wilson's questions and concerns about the parties' respective positions and his evaluation of the evidence, and described his own and Jones' responses. In the document, Stagg indicated that during deliberations he stated that Delta Mine "had presented a substantial amount of data concerning

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[3] By the end of the arbitrations, SESI's bill came close to $200,000.

[4] Document numbers are those used in Delta Mine's *in camera* submission, which is discussed in more detail later in this opinion.

mining costs from a wide variety of contemporaneous studies, and that, in my opinion, AFC had done absolutely nothing to rebut any of those costs or any of the conclusions that were reached." These contemporaneous studies to which Stagg was referring, of course, were prepared by his own engineering firm at counsel's direction. He even pitted his firm's work against AFC's expert, stating that AFC's testimony was "meaningless."

Stagg acknowledged in the memo that Wilson requested additional written input from Jones and Stagg -- without attorney involvement -- as follows:

> He asked that we keep our responses brief, ideally only several pages in outline form, *and that we not bring our respective attorneys into the process,* but rather provide him with our individual arguments, comments, etc. We each agreed to both requests.

Document 1210 (emphasis added). Despite the neutral's directive, Stagg solicited the input of Delta Mine and its counsel on both the content and on evidentiary support for his response. *See* Documents 3081-84 (e-mail messages from Delta Mine's counsel to Stagg providing suggestions on how to respond to certain issues raised by the neutral and citations to evidentiary support) and Document 1225-26 (facsimile transmission from Delta Mine to Stagg providing information about minimum royalties in connection with Stagg's response to neutral arbitrators).

On August 26, 1998, Wilson circulated a draft award to Stagg and Jones for their review and comments. Stagg immediately notified Delta Mine's counsel of the outcome of the award by e-mail (Document 695) and then forwarded copies of the draft award itself to counsel and Delta Mine (Document 690-694). Stagg also solicited counsel's assistance in locating documents presented at the hearing to respond to a portion of Wilson's draft award about royalty payments (Document 695).

There is no indication in the record that Jones or Wilson knew of Stagg's disclosure of the deliberations or the draft award to Delta Mine. The next day, Stagg submitted a written response to Wilson's draft award. Stagg's response questioned the appropriateness of the royalty payments (Document 670-673). Wilson replied by e-mail the same day. Stagg then forwarded the text of Wilson's response to Delta Mine and counsel by fax, with the comment that "I am standing by for your response." (Document 679-689).

The Williamson County panel apparently met on August 28, 1998 to discuss Wilson's draft and the issues regarding the royalty payments raised by Stagg. Once again, Stagg relayed the substance of the panel's deliberations to Delta Mine and counsel via a memorandum of the same date. (Document 4562-4564). In this memorandum, Stagg indicates that he and Jones would be given an opportunity to respond to Wilson's revised draft by not later than August 31, 1998.

On September 22, 1998, Wilson circulated a final draft of his decision to Stagg and Jones with instructions to submit any last responses or comments by the end of the day. Stagg immediately notified Delta Mine's attorneys of the decision by drafting a memorandum which included quotations from the opinion relating to the award of royalty payments to AFC. Stagg closes the memorandum by soliciting comments or suggestions about how he should respond to Wilson's decision to award royalty payments to AFC. Stagg notes his disagreement about this portion of the award in a memorandum to Wilson dated September 22, 1998. On September 23, 1998, Wilson released his proposed award and commentary to the parties. Stagg concurred in the decision on September 29, 1988 and submitted his own commentary addressing the royalty payments. The final award in the Williamson County arbitration was delivered on October 13, 1998.

Stagg made similar contemporaneous disclosures of the deliberations of the Saline County arbitration panel to Delta Mine. That panel began its deliberations on July 1, 1998, and on July 7 Stagg faxed a detailed memorandum regarding those deliberations to Delta Mine. (Document 1216-1224). He described neutral arbitrator Kitts' statements and questions about the issues as well as his and Jones' responses. As Wilson had, Kitts "requested that we not involve our respective attorneys" in providing submittals. Stagg notes that both he and Jones agreed to this request; obviously he did not comply with it.

Unlike neutral Wilson, neutral Kitts apparently did not send a draft of his decision to Stagg until it was almost completed. On Monday, September 21, Stagg reported to Delta Mine that Kitts indicated his decision was written and the supporting commentary was half done, but that Kitts "did not indicate what his decision is." (Document 656). On September 29, Stagg sent the following e-mail to Delta Mine:

> Jim - Do not, I repeat, do not write any checks to AFC today. Gene Kitts has upheld the suspension of the Saline County lease. He had e-mailed Paul and me the document for one last review and comment on Sunday night. I was not able to retrieve it until late last night due to the fact a client had e-mailed me an extremely large document with a lot of image files in it over the week-end. I could not get the e-mail to download during the day yesterday and didn't get it until last night late. I will be responding to Gene today although I don't think I will have much to say other than "go boy".

(Document 642). On October 28, 1998 the Saline County arbitration panel delivered its award.

In marked contrast to Stagg's communications with Delta Mine and its counsel during the deliberations, Jones told AFC nothing about the draft awards or the panel's deliberations until the awards were issued.

B. *Discovery Dispute*

In reaching my decision in this case, I have relied on documents submitted to me *in camera* as part of a pending motion to compel. I do so because I have determined that communications between a non-neutral arbitrator and his appointing party's attorney are not protected from disclosure by any sort of privilege.

These cases were filed as a miscellaneous actions to confirm and to vacate arbitration awards, which normally would not require discovery. However, once AFC raised the issue of arbitrator misconduct, it became apparent that limited discovery was necessary, and I entered a case management order permitting discovery of "the relationship, interests and activities of arbitrator Stagg and his firm to Meadowlark and its witnesses, counsel and experts in the underlying arbitration proceedings...."

Delta Mine immediately sought reconsideration of this Order, claiming the order would require disclosure of materials protected the attorney-client privilege, work product privilege, the "party-arbitrator communication privilege" and the "arbitrator deliberation protection doctrine." To address Delta Mine's concerns and in a futile attempt to avoid ruling on the privilege issues, I modified the scope of discovery to prohibit disclosure of the substance of the underlying communications between Stagg, Delta Mine and counsel, but I still required disclosure of the facts of whether communications had occurred. I specifically did not rule on whether any of the asserted privileges applied. This procedure turned out to be ineffective, because Delta Mine concealed discoverable

information through unsupportable assertions of privilege and through improper descriptions of the withheld documents.

After discovery began, Delta Mine filed a motion to compel AFC to produce a document that was outside the scope of discovery. The sought-after memorandum was written by AFC's party-appointed arbitrator, Paul Jones, to AFC's attorneys and discusses the meeting between the arbitrators at which it was decided to deny AFC's request for a continuance of the hearings. In opposing this motion to compel, AFC pointed out that Delta Mine itself had withheld all documents evidencing communications between Stagg and its counsel in reliance upon the amended case management order and its prior assertions of privilege.

Because Delta Mine sought production of the same type of document that I had previously determined was outside the scope of discovery (and the same kind of document for which it had itself asserted numerous privileges), I decided it was necessary for me to rule on the privilege issues raised by Delta Mine and to determine whether I had properly narrowed the scope of discovery. I ordered both parties to produce for *in camera* inspection all documents reflecting communications between the arbitrators and parties that were not produced during the course of discovery on the grounds that they were protected from disclosure based upon a claim of privilege or because they were outside the scope of the amended case management order.

In response to my order, Delta Mine produced a banker's box of documents and an accompanying privilege log. AFC produced twelve documents, all of which are simply transmittal documents enclosing arbitration related materials made available to both sides. Because Delta Mine put the privilege issue before me when it sought reconsideration of the case management order, I have the authority to rule on Delta Mine's

assertions of privilege as well as on the proper scope of discovery. In reaching my ruling, I see no need to order the disclosure of any documents I did not actually rely upon in reaching my decision.[5] After applying the appropriate standards and considering the arguments made by counsel, I order the disclosure of the following documents submitted by Delta Mine: 642; 648-655; 656; 657-669; 670-673; 679-689; 690-694; 695; 696; 898; 1205-1215; 1216-1224; 1466; 3088; 3176-3179; 3200-3202; 3204-3211; 3212-3213; 3235-3236; and 4557-4558. I will also order that these documents and the accompanying privilege log be made part of the public court file. These documents can be categorized as communications from Stagg to Delta Mine's counsel regarding the substance of the arbitration deliberations and Stagg's communications to the neutral arbitrators concerning the substance of the arbitration award itself. I also order the disclosure of documents 3081-84 and 1225-26, which are communications from Delta Mine and its attorneys to Stagg about Stagg's deliberations. The other documents submitted *in camera* will remain under seal.

The attorney-client privilege does not apply to the documents I have listed above. Stagg is neither the attorney nor the client in this case. He is the arbitrator, and the law does not allow his communications to be shielded from disclosure by the attorney-client or work-product privileges. Because the attorney-client privilege is waived by the voluntary disclosure of privileged communications to third parties, *see United States v. Workman,* 138 F.3d 1261, 1263 (8th Cir. 1998), I overrule Delta Mine's privilege claims on that ground. Moreover, these

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[5] For this reason, I do not decide whether the work-product privilege protects documents created by or given to Stagg's firm in preparation for the arbitration proceedings because my review of the record convinces me that AFC has obtained sufficient discovery into Stagg's involvement in the pre-hearing proceedings without disclosure of these (otherwise relevant and potentially discoverable) documents.

communications were not made for the purpose of securing legal advice, another essential component of the attorney-client privilege. They are also not work product because they were prepared after the arbitrations took place and were therefore not prepared in anticipation of arbitration. Rather, these documents discuss the status of the deliberations of the arbitration panels.

Delta Mine asserted two additional privileges in protection of these documents: the "party arbitrator communication privilege" (a new one to me); and the "arbitrator deliberation protection doctrine." The legal support relied upon by Delta Mine for the assertion of these privileges consists of two cases: (1) *Northwest Airlines, Inc. v. Air Line Pilots Ass'n, Intern.*, 385 F. Supp. 634 (D.D.C. 1974), a case which Delta Mine failed to point out was reversed (albeit on other grounds) on appeal, *see Northwest Airlines, Inc. v. Air Line Pilots Ass'n Intern.*, 530 F.2d 1048 (D.C. Cir.), *cert. denied,* 426 U.S. 942 (1976); and (2) *Gramling v. Food Machinery & Chemical Corp.*, 151 F. Supp. 853 (W.D.S.C. 1957). Neither case supports Delta Mine's assertions of privilege here. There is nothing in either of these cases discussing the so-called "party arbitrator communications privilege." Instead, both cases are presumably cited for the general proposition that an arbitrator's testimony cannot be used to impeach an award because "the deliberations of an arbitration board are as much a part of the judicial process as the deliberations of a jury and should be as zealously protected." *Id.* at 860; *Northwest Airlines;* 385 F. Supp. at 640. This rule merely addresses the admissibility of certain evidence, not whether communications between a party arbitrator and counsel are discoverable. Unlike the communications at issue in those cases, the Stagg documents do not attack any recitals or representations made by the arbitrators in the awards themselves, but instead seek input from a party and its counsel about ways to influence the outcome of the arbitration.

Delta Mine's position on the so-called "arbitrator deliberation protection doctrine" seeks a completely one-sided protection: it already knows the entire content of the deliberations because Stagg -- far from "zealously protecting" the confidentiality of those deliberations -- fully disclosed them to Delta Mine while they were ongoing. While I agree that the arbitrator's deliberations should generally be immune from discovery, Stagg thoroughly destroyed the confidentiality of the deliberations when he disclosed their content to Delta Mine without the knowledge or consent of the neutral arbitrators or AFC's party arbitrator. Delta Mine should not be allowed to treat the deliberations as confidential now just to prevent discovery of Stagg's misconduct by AFC.

Delta Mine did not just conceal these communications during the arbitrations, it also improperly concealed the fact that such communications had occurred from discovery in *these* proceedings. After reviewing the *in camera* documents, I read both parties' submissions and Stagg's deposition testimony again, because I had seen no previous mention in the record that Stagg had been disclosing the arbitrators' deliberations to Delta Mine during the arbitration proceedings. In fact, there was no mention of these facts in the briefs, nor did AFC's attorney question Stagg about these disclosures during his two-day deposition. Needless to say, I was surprised by this omission. After reviewing the privilege log submitted by Delta Mine to AFC, and filed in this case, however, I soon discovered why this issue had not been raised by AFC.

Delta Mine's privilege log affirmatively conceals the fact that Stagg was reporting to Delta Mine on the substance of the arbitration deliberations. It similarly conceals the fact that he transmitted copies of the neutral's draft award to Delta Mine as soon as he received it for the purpose of soliciting counsel's suggestions on how to respond. For example, Document 690-94 is a facsimile transmission of John Wilson's draft award

from Stagg's office to counsel for Delta Mine. Delta Mine's privilege log describes the document only as a "fax cover page with attachment forwarding material from Alan Stagg regarding status of Williamson County arbitration." Similarly, Document 695 is an electronic mail message sent to Delta Mine counsel from Alan Stagg informing them of the outcome and substance of the draft award, including a quotation from the opinion itself. Stagg solicits counsel's assistance because he and Jones were asked by the neutral to respond to the proposed award in two days. This is identified on Delta Mine's privilege log with the same vague reference to "discussing status of Williamson County arbitration."

This labeling of draft opinions as "status" reports was intentionally misleading. As such, it is contrary to the letter and the spirit of our discovery rules and absolutely unacceptable from members of this bar. The discovery abuses in this case reflect a pattern of concealment and misleading behavior that began at the initial arbitration conference and continued throughout the proceedings in this Court.

Because I am ordering the disclosure of Delta Mine's documents as set forth above, I will likewise order AFC to disclose the October 23, 1997 and April 8, 1998 *in camera* letters from its party-appointed arbitrator Paul Jones to counsel concerning the arbitration procedures and AFC's futile request for continuance. Unlike Delta Mine's withheld documents, these communications do not reveal the substantive deliberations of the arbitration panels, and they were, in fact, outside the scope of my discovery order. I find nothing untoward from the expectation that the party arbitrators inform their parties of the panel's decisions on various procedural matters. The AFC documents do no more than that. I order them produced only because they are relevant to the extent that they evidence AFC's understanding about the proper role of the party-appointed arbitrators. Because I did not rely on any of the

other *in camera* documents in reaching my decision, I do not find it necessary to order their disclosure.

II. *Discussion*

This case is governed by the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.* Delta Mine argues that the Illinois Uniform Arbitration Act, 710 ILCS § 5/1 *et seq.*, not the FAA, applies because the leases do not involve interstate commerce. While it is true that the FAA only applies where there is "a contract evidencing a transaction involving commerce," 9 U.S.C. § 2, the Supreme Court has interpreted this language very broadly to reach the full limits of Congress' Commerce Clause power. *Allied-Bruce Terminix Companies, Inc. v. Dobson,* 513 U.S. 265, 277 (1995). Thus, the FAA applies if the transaction in fact involves interstate commerce, even if the parties did not contemplate an interstate commerce connection at the time the contract was executed. *Id.* at 281. The leases were executed by corporations of different states for the mining, sale and consumption of coal. The leases do not restrict the sale and consumption of coal to the state of Illinois. In fact, Delta Mine's own witnesses testified at the arbitration hearings that the coal from the Delta Mine was sold, shipped and marketed to customers outside Illinois. The FAA accordingly applies. Even if the IUAA, not the FAA, applied, the result would be the same because the minor differences in the statutes do not affect my conclusions regarding the parties' agreements here.

Section 10 of the FAA provides that a district court may vacate an arbitration award:

(1) Where the award was procured by corruption, fraud, or undue means.

(2) Where there was evident partiality or corruption in the arbitrators, or either of them.

(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy, or of any other misbehavior by which the rights of any party have been prejudiced.

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a). Unless vacated, modified or corrected under Sections 10 or 11 of the FAA, the court is required to confirm an arbitration award upon application of a party. 9 U.S.C. § 9.

"Judicial review of arbitration decisions is limited. For the most part, courts may vacate an arbitration award only for the reasons set forth in the Arbitration Act." *Painewebber Group, Inc. v. Zinsmeyer Trusts Partnership,* 187 F.3d 988, 991 (8th Cir. 1999). In determining the legal standard of evident partiality or corruption, the Supreme Court noted that the AAA's Rules on disclosure of impartiality or bias "rest on the premise that any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias." *Commonwealth Coatings Corp. v. Continental Cas. Co.,* 393 U.S. 145, 150 (1968). However, in the context of party-appointed arbitrators, "there has grown a common acceptance of the fact that the party-designated arbitrators are not and cannot be 'neutral', [sic] at least in the sense that the third arbitrator or a judge is." *Metropolitan Property and Cas. Ins. Co. v. J.C. Penney Cas. Ins. Co.,* 780 F. Supp. 885, 891 (D. Conn. 1991) (internal quotation marks omitted).

"The fact that party selected arbitrators are not expected to be 'neutral', however, does not mean that such arbitrators are excused from their ethical duties and the obligation to participate in the arbitration process in a fair, honest, and good-faith manner. *Id.* (citing *Aetna Cas. & Sur. Co. v. Grabbert,* 590 A.2d 88, 93-94 (R.I. 1991)). As noted by the district court in *Metropolitan Property,* the arbitration codes for numerous states also impose similar ethical obligations to those stated in the AAA's Code. *See* 780 F. Supp. at 891, and cases cited therein.

A. *The Parties' Contentions*

AFC contends that the arbitration awards should be vacated for the following reasons:

1) Stagg's undisclosed participation in the pre-hearing proceedings amounted to evident partiality, fundamentally corrupted the proceedings and unfairly prejudiced AFC;

2) the panels' order refusing to allow counsel to examine and cross-examine witnesses was an abuse of authority that provided Delta Mine with an unfair advantage at the hearings;

3) the arbitrators exceeded their powers by ordering consolidation;

4) the Williamson County award was tainted by additional misconduct because the neutral refused to allow AFC to present newly discovered evidence; and

5) the awards are irrational.

Delta Mine disputes these claims and maintains that the Williamson County award should be modified (albeit for different reasons) and that both awards should then be

confirmed. Because I believe that both awards should be vacated due to Stagg's misconduct, I do not reach the other arguments raised by AFC or Delta Mine's arguments in support of modifying the Williamson County award.

B. *Agreement of the Parties*

The essence of arbitration is agreement. Arbitrations are premised upon an agreement of the parties and are accordingly limited by that agreement. Because arbitrations are designed to afford a speedy resolution of disputes without judicial intervention, the process is flexible to accommodate the needs of the parties. Therefore, the parties may agree to waive procedural and substantive protections of the judicial system in favor of a forum more tailored to their particular dispute.

Needless to say, the whole process of arbitration falls apart when parties fail to agree on its parameters. That is exactly what happened in this case. Although the parties agreed to submit their disputes to arbitration, there apparently was no meeting of the minds about how this arbitration was going to be conducted, the role of the party-appointed arbitrators and whether the Code of Ethics for Commercial Arbitrators ("Code") would apply to the arbitrations.

With respect to the role of the party-appointed arbitrators, Delta Mine argues that Stagg and Jones were *per se* partisan arbitrators simply because the leases provided for their unilateral selection. Rule 12 of the AAA Rules states that "unless the parties agree otherwise, an arbitrator selected unilaterally by one party is a party-appointed arbitrator and is not subject to disqualification for bias or relationships with the parties and may be predisposed toward the party who appointed them." However, the mere fact that an arbitrator is party-appointed does not automatically render him partisan. As the Code recognizes:

> In all arbitrations in which there are two or more party-appointed arbitrators, it is important for everyone concerned to know from the start whether the party-appointed arbitrators are expected to be neutrals or nonneutrals. In such arbitrations, the two party-appointed arbitrators should be considered nonneutrals unless both parties inform the arbitrators that all three arbitrators are to be neutral or unless the contract, the applicable arbitration rules, or any governing law requires that all three arbitrators be neutral.

As the Rules and accompanying Code make clear, it is the parties' agreement that determines the proper role of the party-appointed arbitrators. Delta Mine takes the position that AFC simply missed the boat by not treating Jones as it treated Stagg, but the evidence convinces me that it was Delta Mine, not AFC, who failed to comply with the parties' agreement. Stagg's partial disclosures and Delta Mine's behavior at the organizational meeting were especially misleading because they convinced AFC that an agreement existed about the conduct of the party-appointed arbitrators when, in fact, Delta Mine had no intention of complying with the terms of that agreement.

From my review of the transcript of the initial organizational meeting, I do believe that the parties agreed that the party-appointed arbitrators were expected to serve as non-neutrals. Despite what Delta Mine argues, however, this fact does not excuse the party-appointed arbitrators from all ethical obligations. Delta Mine makes much of the fact that the preamble to the Code of Ethics states that it does not form part of the AAA Rules.[6] While this is true, Delta Mine ignores the

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[6] Having abandoned its earlier claim that Stagg complied with the Code, Delta Mine presumably makes this argument because it cannot dispute that Stagg violated several provisions of the Code as it relates to non-neutral arbitrators.

fact that the parties can agree to apply the Code in an arbitration, which is precisely what AFC contends happened in this case. Delta Mine also ignores the preamble to the Code, which states:

> This Code is intended to apply to all such proceedings in which disputes or claims are submitted for decision to one or more arbitrators appointed in a manner provided by an agreement of the parties, by applicable arbitration rules, or by law. In all such cases, the persons who have the power to decide should observe fundamental standards of ethical conduct.

Moreover, courts look to the Code for guidance on the ethical standards governing arbitrators, *see Metropolitan Property and Cas. Ins. Co. v. J.C. Penney Cas. Ins. Co.*, 780 F. Supp. 885, 891-92 (D. Conn. 1991), and even Delta Mine has admitted that the Code provides "the principal authority on proper arbitrator conduct."

The parties did not agree to waive the provisions of the Code, and Delta Mine never made its intention not to follow it clear to AFC or to the neutral arbitrators. At the initial scheduling conference, AFC passed out both the Rules and the Code and made several statements that is believed the Code applied to the arbitrators in this case. Neither Delta Mine nor Stagg raised any objections during this meeting about the applicability of the Code's ethical standards or disclosure requirements. Instead, Stagg accepted the Code and made a misleading partial disclosure about the nature and extent of his relationship with Delta Mine and Delta Mine's counsel that did not comply with the requirements of the Code. It is clear that, after this meeting, AFC thought that the arbitrators agreed to follow the provisions of the Code. Jones has testified that he was unaware of Stagg's involvement in the preparation of Delta Mine's case and that he thought he was prohibited from getting

involved in the preparation of AFC's case. If Delta Mine had a different understanding about the binding effect of these rules on the arbitrators, it never voiced that understanding. Under these circumstances, I find that AFC reasonably believed, and the parties agreed, that the party-appointed arbitrators were going to follow the provisions of the Code applicable to non-neutral arbitrators.

Stagg's failure to make sufficient disclosures under the Code (a fact which Delta Mine glosses over as a mere technicality) was particularly misleading in this case because Canon VII of the Code required Stagg to "first inform the other arbitrators and the parties" that he intended to communicate with Delta Mine about the substance of the upcoming arbitrations. If Stagg had disclosed the fact of his communications to AFC as required by the Code, then AFC would have at least been alerted to the possibility that Delta Mine did not intend Stagg to play the same role in the proceedings that AFC expected of Jones. This "deception by omission" unfairly prejudiced the proceedings against AFC. It is inaccurate, then, for Delta Mine to suggest that Stagg's involvement in the pre-hearing proceedings should have been known by AFC simply because he was named a party-appointed arbitrator.

I recognize that party-appointed arbitrators play a different role than that of neutral arbitrators, but parties to an arbitration must adhere to those rules by which they agree to abide. Because I find that Delta Mine at least pretended to agree that the arbitrators were bound by the provisions of the Code, I must now decide what force these rules have in the context of this case. I agree with Delta Mine that not every technical violation of the rules requires vacatur of an arbitration award. However, a party can demonstrate that an arbitrator is guilty of prejudicial misconduct in violation of the FAA by refusing to follow the applicable rules of conduct. *See Sunkist Soft Drinks, Inc. v.*

Sunkist Growers, Inc., 10 F.3d 753, 759 (11th Cir. 1993), *cert. denied*, 513 U.S. 869 (1994). The Code and the Rules are therefore relevant for these reasons.

C. *Code of Ethics*

Canon VII of the Code sets out ethical considerations for party-appointed arbitrators. It provides:

> A. *Obligations under Canon I*
>
> Nonneutral party-appointed arbitrators should observe all of the obligations of Canon I to uphold the integrity and fairness of the arbitration process, subject to only the following provisions.
>
> 1. Nonneutral arbitrators may be predisposed toward the party who appointed them but in all other respects are obligated to act in good faith and with integrity and fairness. For example, nonneutral arbitrators should not engage in delaying tactics or harassment of any party or witness and should not knowingly make untrue or misleading statements to the other arbitrators.
> 2. The provisions of Canon I.D relating to relationships and interests are not applicable to nonneutral arbitrators.

B. *Obligations under Canon II* [7]

Nonneutral party-arbitrators should disclose to all parties, and to the other arbitrators, all interests and relationships which Canon II requires to be disclosed. Disclosure as required by Canon II is for the benefit not only of the party who appointed the nonneutral arbitrator, but also for the benefit of the other parties and arbitrators so that they may know of any bias which may exist or appear to exist. However, this obligation is subject to the following provisions:

1. Disclosure by nonneutral arbitrators should be sufficient to describe the general nature and scope of any interest or relationship, but need not include as detailed information as is expected from persons appointed as neutral arbitrators.

2. Nonneutral arbitrators are not obliged to withdraw if requested to do so by the party who did not appoint them, notwithstanding the provisions of Canon II E.

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[7] Canon II states: "An Arbitrator should disclose any interest or relationship likely to affect impartiality or which might create an appearance of partiality or bias." Canon II requires arbitrators to disclose:

1. any direct or indirect financial or personal interest in the outcome of the arbitration;

2. any existing or past financial, business, professional, family or social relationships which are likely to affect impartiality or which might reasonably create an appearance of partiality or bias. Persons requested to serve as arbitrators should disclose any such relationships which they personally have with any party or its lawyer, or with any individual whom they have been told will be a witness. They should also disclose any such relationships involving members of their families or their current employers, partners or business associates.

C. *Obligations under Cannon III* [8]

Nonneutral party-appointed arbitrators should observe all of the obligations of Cannon III concerning communications with the parties, subject only to the following provisions.

1. In an arbitration in which the two party-appointed arbitrators are expected to appoint the third arbitrator, arbitrators may consult with the party who appointed them concerning the acceptability of persons under consideration for appointment as the third arbitrator.

2. Nonneutral arbitrators may communicate with the party who appointed them concerning any other aspect of the case, provided they first inform the other arbitrators and the parties that they intend to do so. If such communication occurred prior to the time the person was appointed as arbitrator, or prior to the first hearing or other meeting of the parties with the arbitrators, the nonneutral arbitrators should, at the first hearing or meeting, disclose the fact that such communication has taken place. In complying with the provisions of this paragraph, it is sufficient that there be disclosure of the fact that such communication has occurred without disclosing the content of the communication. It is also sufficient to disclose at any time the intention to follow the procedure of having such communications in the future and there is no requirement thereafter that there be

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[8] Canon III provides: "An arbitrator in communicating with the parties should avoid impropriety or the appearance of impropriety."

disclosure before each separate occasion on which such a communication occurs.

3. When nonneutral arbitrators communicate in writing with the party who appointed them concerning any matter as to which communication is permitted under this code, they are not required to send copies of any such written communication to any other party or arbitrator.

D. *Obligations under Canon IV*

Nonneutral party-appointed arbitrators should observe all of the obligations of Canon IV to conduct the proceedings fairly and diligently.

E. *Obligations under Canon V*[9]

Nonneutral party-appointed arbitrators should observe all of the obligations of Canon V concerning making decisions, subject only to the following provision.

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[9] Canon V states that "[a]n arbitrator should make decisions in a just, independent and deliberate manner." Included in Canon V are the following provisions:

A. An arbitrator should, after careful deliberation, decide all issues submitted for determination. An arbitrator should decide no other issues.

B. An arbitrator should decide all matters justly, exercising independent judgment, and should not permit outside pressure to affect the decision.

C. An arbitrator should not delegate the duty to decide to any other person.

1. Nonneutral arbitrators are permitted to be predisposed toward deciding in favor of the party who appointed them.

F. *Obligations under Canon VI* [10]

Nonneutral party-appointed arbitrators should observe all of the obligations of Canon VI to be faithful to the relationship of trust inherent in the office of arbitrator, subject only to the following provision.

1. Nonneutral arbitrators are not subject to the provisions of Canon VI.D with respect to any payments by the party who appointed them.

Stagg violated many of these Canons and the FAA.

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[10] Canon VI mandates that "[a]n arbitrator should be faithful to the relationship of trust and confidentiality inherent in that office," which includes the following duties:

A. An arbitrator is in a relationship of trust to the parties and should not, at any time, use confidential information acquired during the arbitration proceeding to gain personal advantage or advantage for others, or to affect adversely the interest of another.

B. Unless otherwise agreed by the parties, or required by applicable rules or law, an arbitrator should keep confidential all matters relating to the arbitration proceedings and decision.

C. It is not proper at any time for an arbitrator to inform anyone of the decision in advance of the time it is given to all parties. In a case where there is more than one arbitrator, it is not proper at any time for an arbitrator to inform anyone concerning the deliberations of the arbitrators. After an arbitration award has been made, it is not proper for an arbitrator to assist in post-arbitral proceedings, except as it is required by law.

D. *Pre-Hearing Conduct*

From the record, it is clear that Stagg acted much more like a litigation consultant or non-testifying expert than an arbitrator.[11] Stagg and his consulting firm created evidence to be presented at the hearing. They viewed the property, interviewed and prepared witnesses, compiled data, provided research assistance and created exhibits to be presented at the hearings. They also participated in a mock arbitration only days before the hearings began. Delta Mine contends that Stagg's pre-hearing conduct is perfectly commonplace and even expected of party-appointed arbitrators in the coal industry. In support of this assertion, Delta Mine has presented the testimony of three expert witnesses who opine that Stagg's degree of involvement in the pre-hearing proceedings was not objectionable. Although Stagg's pre-hearing conduct could have been appropriate if both parties had agreed to such a procedure, the experts ignore the fact that the parties did not agree on such a procedure and that AFC was led to believe that they had agreed on a very different kind of proceeding. To the extent that the witnesses testified that the Code is not binding, I agree that the Code is not a mandatory provision of the Rules, but I do not agree that it did not apply at all in this case. And as I have previously stated, the Canons of the Code provide useful guidance in evaluating Stagg's conduct in any event.

As I have discussed above, Stagg's initial disclosures at the organizational meeting were also misleading, because he failed

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[11] Delta Mine's brief is misleading when it describes the nature and extent of Stagg's involvement in the pre-hearing proceedings. Delta Mine also claims that Stagg's participation became "necessary" only after the panel members decided that the party-appointed arbitrators should conduct the examination of the witnesses. The record reveals that Stagg and his firm had begun participating in the preparation of Delta Mine's case before the organizational meeting and that their level of involvement was well beyond what was expected by the panel.

to reveal his substantial and ongoing relationship with Delta Mine and counsel. Stagg's partial disclosure was deceptive and tainted the arbitration proceedings. In addition, the disclosure did not comply with Canons II and VII of the Code. While I believe that Stagg could have cured the misleading nature of those early disclosures, he did not do so.

Stagg's creation of evidence for the arbitrations and significant consulting relationship with Delta Mine and counsel amounted to evident partiality in violation of the FAA. It strains credulity to suggest that Stagg was able to consider the evidence of record fairly during the course of deliberations (as everyone agrees that he must) when he and his firm created that evidence. Stagg's extensive involvement in the pre-hearing proceedings divested him of the ability to "decide all matters justly, exercising independent judgment" as required by Canons V and VII. I also find that his firm's longstanding consulting relationship with Delta Mine and counsel in this case and others created "outside pressure [which] affected the decision" in violation of Canons V and VII. In reaching this decision, I am considering not only Stagg's entanglement with the merits of the dispute before the hearings began, but also his misconduct during deliberations. I think that Stagg's disclosure of the panel's deliberations and his communications with Delta Mine and counsel about how to sway the arbitrators to rule in Delta Mine's favor provide conclusive evidence that Stagg could not, and did not, set aside his evident partiality toward Delta Mine during the deliberations.

In support of confirming and modifying the awards, Delta Mine relies heavily upon the Eleventh Circuit's decision in *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 759 (11th Cir. 1993). In *Sunkist*, the Eleventh Circuit refused to vacate an arbitration award under the FAA because of a party-appointed arbitrator's participation in the pre-hearing proceedings. The Eleventh Circuit stated: "The AAA, under

whose rules the parties were contractually bound to proceed, recognizes inherently different rules for neutral and non-neutral arbitrators and imposes less exacting duties and less burdensome disclosure rules upon non-neutral arbitrators." *Id.* at 759. The Court found that the party-appointed arbitrator had not violated the Code because he did not base his deliberations or award on "anything other than the evidence of record." *Id.* Moreover, the court found that the party-appointed arbitrator's written notification of his contacts with his nominator in accordance with Canon VII was sufficient to satisfy his disclosure obligations under the Code because there had been no showing that he had a direct financial relationship with any party to the arbitration. *Id.* at 760. The Eleventh Circuit concluded:

> A party-appointed arbitrator must consider the evidence of record in good faith and with integrity and fairness. The fact that [the party-appointed arbitrator] may have been predisposed towards [his nominator's] case is not sufficient to vacate the arbitration award. The evidence relied upon by Sunkist is insufficient to support a finding that [the party-appointed arbitrator] acted improperly either before or during the arbitration hearing. Therefore, the district court did not abuse its discretion in denying Sunkist's motion to vacate the arbitration award.

Id. Although *Sunkist* provides useful guidance about the ethical responsibilities of non-neutral arbitrators under the Rules, it is distinguishable from the present case.

Here, Stagg's pre-hearing conduct went far beyond that found commonplace by the Eleventh Circuit in *Sunkist.* In contrast to the non-neutral arbitrator in *Sunkist,* Stagg and his firm did much more than simply provide suggestions to witnesses on the presentation of evidence: they created the

evidence to be presented at the hearings. Unlike the non-neutral arbitrator in *Sunkist,* Stagg did not comply with Canon VII of the Code. He engaged in extensive pre-hearing preparations without disclosing the fact of his communications with Delta Mine as required by the Canon VII. Stagg also failed to disclose his significant consulting relationship with Delta Mine and counsel. Instead, he made a partial misleading disclosure at the November organizational meeting which he never amended. Finally, there is no indication that the non-neutral arbitrator in *Sunkist* disclosed the substance of the deliberations to his nominating party as Stagg did. *Sunkist* does not preclude vacatur of the awards in this case.

I do not believe the arbitration panels' rejection of AFC's objections during the arbitration proceedings precludes me from considering these issues. The panels did not have all of the relevant information before they made their decision to deny AFC's request for discovery and a continuance. More importantly, of course, the panels did not know about Stagg's disclosure of their deliberations to Delta Mine, because it had not yet occurred.

E. *Post-Hearing Conduct*

Stagg's conduct during the deliberative process also mandates vacatur of the awards under the FAA. As I have previously stated, Stagg disclosed the panels' deliberations to Delta Mine and sought counsels' suggestions on how to persuade the neutrals to rule in Delta Mine's favor. These facts were concealed from AFC during the arbitrations and during this case. Although neither party deposed the neutral arbitrators in this case, nothing in the record suggests that the neutrals knew about or approved of such disclosures. In fact, Stagg acknowledges that he and Jones were instructed to present the best case for their appointing parties without the involvement of counsel. Despite these explicit instructions, Stagg

immediately sought the advice of Delta Mine and its attorneys in connection with his responses to the neutrals.

Stagg's disclosures were not generic "hints" to Delta Mine about how he thought the proceedings were going; they were detailed memoranda containing blow-by-blow descriptions of what the panels discussed, evaluations of the evidence by the neutrals and Jones and the panels' opinions on the relative strengths and weaknesses of the parties' respective positions. Aside from destroying the confidentiality of the panels' deliberations, these memoranda also sought input from Delta Mine and counsel to manipulate the process to Delta Mine's advantage. Although the parties' experts disagree on the ethical obligations of a party-appointed arbitrator during pre-hearing proceedings, even Delta Mine's experts concede that a party-appointed arbitrator is expected to decide the case fairly based on his independent judgment of the evidence. (*See* Coulson Report at 4; Ward Dep. at 93-96; Wright Report at 1 and Dep. at 82).

Stagg's behavior is not only inconsistent with these basic obligations of integrity and fairness inherent in the position of arbitrator, it also violates the following specific provisions of Canons V and VII of the Code:

> An arbitrator should decide all matters justly, exercising independent judgment, and should not permit outside pressure to affect the decision.
>
> An arbitrator should not delegate the duty to decide to any other person.

Stagg did not exercise his independent judgment when deciding the matters before the panel; instead, he acted as the inside mouthpiece for Delta Mine. He solicited counsel's input on how to persuade the neutral to decide in Delta Mine's favor. These improper communications shifted the ability to influence

and decide the outcome of the arbitrations to Delta Mine. Stagg also disclosed the substance of the deliberations of the panels and disclosed the outcome of the decisions to Delta Mine before the neutrals issued the final award in violation of Canons VI and VII of the Code.

None of the expert witnesses addressed the particular circumstances of Stagg's misconduct during deliberations because these facts were concealed by Delta Mine, but I find that Stagg's numerous breaches of his ethical duties under the Code constitute corruption in violation the FAA.

Moreover, I find that Delta Mine's participation in Stagg's misconduct amounted to "undue means" under the FAA. The Eighth Circuit recently clarified the definition of "undue means" as follows:

> The term "undue means" must be read in conjunction with the words "fraud" and "corruption" that precede it in the statute. *See Drayer v. Krasner,* 572 F.2d 348, 352 (2d Cir.), *cert. denied,* 436 U.S. 948, 98 S.Ct. 2855, 56 L.Ed.2d 791 (1978). Consistent with the plain meaning of fraud and corruption, and with the limited scope of judicial review of arbitration awards, other circuits have uniformly construed the term undue means as requiring proof of intentional misconduct. *See American Postal Workers Union, AFL-CIO v. United States Postal Serv.,* 52 F.3d 359, 362 (D.C.Cir.1995) (undue means limited to conduct "equivalent in gravity to corruption or fraud, such as a physical threat to an arbitrator"); *A.G. Edwards & Sons, Inc. v. McCollough,* 967 F.2d 1401, 1403 (9th Cir. 1992) (undue means "connotes behavior that is immoral if not illegal"), *cert. denied,* 506 U.S. 1050, 113 S.Ct. 970, 122 L.Ed.2d 126 (1993); *Shearson Hayden Stone, Inc. v. Liang,* 493 F.Supp. 104, 108

> (N.D. Ill.1980) ("'undue means' requires some type of bad faith in the procurement of the award"), *aff'd*, 653 F.2d 310 (7th Cir.1981). Undue means does not include "sloppy or overzealous lawyering." *Edwards*, 967 F.2d at 1403. In an unreported case, the Sixth Circuit applied this strict standard in rejecting a claim that a party used undue means to prevail in a discovery dispute before the arbitrators. *See Pontiac Trail Medical Clinic, P.C. v. PaineWebber, Inc.*, 1 F.3d 1241, 1993 WL 288301 at *5 (6th Cir. 1993). We agree with those decisions.

Id. Delta Mine colluded with Stagg to subvert the arbitration process and to secure a favorable award for it at all costs. I believe that their behavior constitutes intentional misconduct prohibited by the FAA.

III. *Conclusion*

Because Stagg and Delta Mine's misconduct rendered the proceedings fundamentally unfair, I will vacate the awards without considering the underlying merits of this dispute. To the extent that the FAA requires me to find that the misconduct affected the outcome of the arbitrations, I believe that showing has been met in this case. Stagg and Delta Mine conspired to achieve a favorable outcome for Delta Mine and it worked. Because their deception tainted the deliberative process, it affected the outcome of the proceedings and substantially prejudiced AFC.

Accordingly,

IT IS HEREBY ORDERED that respondent's counter-applications to vacate arbitration awards are granted, and the arbitration awards are vacated and the parties are remanded back to arbitration in accordance with the terms of their agreement.

IT IS FURTHER ORDERED that petitioners' motions to confirm and modify arbitration awards are denied.

IT IS FURTHER ORDERED that petitioners' motion to compel [#54-1] is granted in part and denied in part as set forth above; AFC shall produce the October 23, 1997 and April 18, 1998 letters submitted *in camera;* Delta Mine shall produce documents numbered 642; 648-655; 656; 657-669; 670-673; 679-689; 690-694; 695, 696; 898; 1205-1215; 1216-1224; 1225-1226; 1466; 3081-3084; 3088; 3176-3179; 3200-3202; 3204-3211; 3212-3213; 3235-3236; and 4557-4558. The Clerk of Court shall place the listed documents in the public portion of the file; all other documents submitted *in camera* shall remain under seal.

IT IS FURTHER ORDERED that all other pending motions are denied as moot.

Separate Judgments are entered in each case this same date.

/s/ Catherine D. Perry
CATHERINE D. PERRY
UNITED STATES DISTRICT JUDGE

Dated this 28th day of September, 2000.

APPENDIX C

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 00-3646

Delta Mine Holding Company; Meadowlark, Inc.,
Appellants,

v.

AFC Coal Properties, Inc.,
Appellee.

Order Denying Petition for Rehearing
and for Rehearing En Banc

February 20, 2002

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX D

9 U.S.C. §§ 1-16

9 U.S.C. § 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means the commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

9 U.S.C. § 2. Validity, irrevocability and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or equity for the revocation of any contract.

9 U.S.C. § 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such

arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

9 U.S.C. § 5. Appointment of arbitrators or umpire

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

9 U.S.C. § 6. Application heard as motion

Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided.

9 U.S.C. § 7. Witnesses before arbitrators; fees; compelling attendance

The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

9 U.S.C. § 8. Proceedings begun by libel in admiralty and seizure of vessel or property

If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything

herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.

9 U.S.C. § 9. Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

9 U.S.C. § 10. Same; vacation; grounds; rehearing[1]

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration -

(1) Where the award was procured by corruption, fraud, or undue means.

(2) Where there was evident partiality or corruption in the arbitrators, or either of them.

(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(5) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

(b) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved

[1] This section was modified by technical amendments enacted by PL 107-169, 2002 HR 861 (May 7, 2002).

by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

9 U.S.C. § 11. Same; modification or correction; grounds; order

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration--

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

9 U.S.C. § 12. Notice of motions to vacate or modify; service; stay of proceedings

Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the

adverse party shall be a nonresident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

9 U.S.C. § 13. Papers filed with order on motions; judgment; docketing; force and effect; enforcement

The party moving for an order confirming, modifying, or correcting an award shall, at the time such order is filed with the clerk for the entry of judgment thereon, also file the following papers with the clerk:

(a) The agreement; the selection or appointment, if any, of an additional arbitrator or umpire; and each written extension of the time, if any, within which to make the award.

(b) The award.

(c) Each notice, affidavit, or other paper used upon an application to confirm, modify, or correct the award, and a copy of each order of the court upon such an application.

The judgment shall be docketed as if it was rendered in an action.

The judgment so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.

9 U.S.C. § 14. Contracts not affected

This title shall not apply to contracts made prior to January 1, 1926.

9 U.S.C. § 15. Inapplicability of the Act of State doctrine

Enforcement of arbitral agreements, confirmation of arbitral awards, and execution upon judgments based on orders confirming such awards shall not be refused on the basis of the Act of State doctrine.

9 U.S.C. § 16. Appeals

(a) An appeal may be taken from--

(1) an order--

(A) refusing a stay of any action under section 3 of this title,

(B) denying a petition under section 4 of this title to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,

(D) confirming or denying confirmation of an award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order--

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title

APPENDIX E

Article Eight of the Parties' Coal Mining Leases

ARTICLE EIGHT

ARBITRATION

8.1 Scope of Arbitration. The following disputes between the Parties shall be resolved by arbitration:

(a) Any dispute expressly required to be resolved by arbitration by any other provision hereof;

(b) Any dispute with respect to the propriety of mining practices hereunder;

(c) Any dispute with respect to the sufficiency or accuracy of any reports, records or maps required to be kept or submitted by Lessee hereunder; and

(d) Any other dispute hereunder which the Parties agree in writing to submit to arbitration;

but no other disputes arising under or with respect to this Lease shall be required to be resolved by arbitration.

8.2 Arbitration. Any dispute required to be resolved by arbitration under Section 8.1 hereof shall, upon the written demand of either Party to the other therefor, be submitted to the arbitration of three arbitrators, one selected by Lessor, one by Lessee, and a third selected by the other two arbitrators in accordance with the then applicable rules of the American Arbitration Association. If either Party fails to select an arbitrator within 15 days after the other has given such written demand, naming its arbitrator therein, or if the two arbitrators, selected as provided herein, fail to select a third within 20 days after the appointment of the second of

them, then in the first instance the Party having named its arbitrator and in the second instance either or both of the Parties may apply to the Senior Judge then sitting on the United States District Court for the Southern District of Illinois, to select such arbitrator for the other Party or such third arbitrator, as the case may be; and if said Judge declines to make such selection, such Party or Parties may apply to the American Arbitration Association to make such selection, in accordance with the rules and regulations thereof.

8.3 Qualification of Arbitrators. Any adult person shall be qualified to be an arbitrator hereunder; provided, however, that no person shall be eligible for appointment as the third arbitrator if such person is an officer, employee or shareholder of, attorney or auditor to, or otherwise interested in, either of the Parties or the matter to be arbitrated hereunder; provided, further, that each of the arbitrators in any dispute to be resolved by arbitration under Section 2.2, 3.3, 9.8, or 11.3 hereof shall be a professional mining engineer, or firm of professional mining engineers, and in any dispute to be resolved by arbitrators under Section 9.7.3(b) hereof shall be a licensed real estate appraiser.

8.4 Decision and Binding Effect. The written determination of two or more of the arbitrators on any dispute submitted to them shall be final and binding upon the Parties and may be enforced by either Party in any court of competent jurisdiction. Arbitration proceedings hereunder shall, except as specifically provided otherwise herein, comply with the then applicable rules of the American Arbitration Association.

8.5 Costs. In any arbitration, Lessor and Lessee shall each pay the expenses of its own arbitrator, and the fees and expenses of its counsel and witnesses, and all other costs

thereof shall be divided equally between them, unless the arbitrators shall otherwise direct.

8.6 Suspension of Period for Cure. In the event that whether a default in Lessee's obligations has occurred hereunder depends on the determination of any dispute required to be resolved by arbitration under Section 8.1 hereof, none of the time permitted under this Lease for cure of such default shall be deemed to elapse during the period commencing from the date either Party gives the other written demand for arbitration under Section 8.2 hereof and ending ten days after Lessee receives written notice of the arbitrators' final determination of such dispute.

(2)

No. 01-1709

IN THE

Supreme Court of the United States

AFC COAL PROPERTIES, INC.,
Petitioner,

v.

DELTA MINE HOLDING COMPANY
and MEADOWLARK, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent Delta Mine Holding Company states that RAG Midwest Holding Company, RAG American Coal Company, RAG American Coal Holding, Inc., and RAG Coal International Aktiengesellschaft * are corporate parents of Delta Mine Holding Company. There are no publicly held companies that own more than 10% of Delta Mine Holding Company's stock. Respondent Meadowlark, Inc. states that Coal Ventures Holding Company, Inc., Horizon Natural Resources Company, and Horizon NR LLC are corporate parents of Meadowlark, Inc. There are no publicly held companies owning 10% or more of Meadowlark, Inc.'s stock.

* RAG International Aktiengesellschaft has further parent corporations in Germany which are entirely privately held.

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IN THE

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that this Court deny the petition for writ of certiorari seeking review of the Eighth Circuit's opinion reported at *Delta Mine Holding Co. v. AFC Coal Properties, Inc.*, 280 F.3d 815 (8th Cir. 2001).

COUNTERSTATEMENT

This case involves two arbitration awards issued in connection with the termination and suspension of royalty payments under two coal mining leases. The arbitration provisions of each lease contemplated a tripartite arbitration panel composed of two partisan arbitrators, one appointed by each side, and a neutral, appointed by the two partisans. Each arbitrator was required to be a "professional mining engineer or firm of professional mining engineers." Each of the *partisan* arbitrators was permitted to be an officer, employee,

shareholder, attorney, auditor of, or be otherwise interested in, the company that appointed him or her. Consistent with this structure, both panels decided that each of the two partisan arbitrators would take an active role representing his respective party at the hearings (*e.g.* by examining witnesses, etc.). The neutral arbitrator on each panel—the umpire—would then be the deciding vote on each panel.

Although the role of the party-arbitrator was determined by the parties, as reflected in the parties' arbitration agreement and in the rulings of the arbitration panel itself, the district court effectively substituted its own view of the appropriate role of a party-arbitrator and vacated the award. The United States Court of Appeals for the Eighth Circuit reversed, finding that neither the contract which contemplated arbitration by a panel composed of two partisans and a neutral, nor the procedures for the arbitration developed and applied by the panels, were unfair or impermissible under federal law. The court held that the awards were not tainted with "evident partiality" and should be confirmed under the Federal Arbitration Act.

A. The Arbitration Provisions Of The Leases

The underlying arbitration disputes concern two mining leases for property in southern Illinois. Meadowlark Farms, Inc. (now Meadowlark, Inc.) was the lessee. Delta Mine Holding Company ("Delta Mine") was subsequently incorporated to hold Meadowlark's assets and liabilities associated with the leases. Penn Central Corporation (now known as AFC Coal Properties, Inc.) was the lessor. Each lease permits cessation of royalty payments upon a determination that the premises no longer contain "Economically Recoverable Coal." The leases provide that disputes over such determinations are subject to arbitration.

Section 8.2 of each lease provides for an arbitration panel of "three arbitrators, one selected by Lessor, one by Lessee,

and a third selected by two other arbitrators . . . ." The leases specify that only the *neutral* shall not be an "officer, employee or shareholder of, attorney or auditor to, . . . either of the Parties . . . ." Reflecting the highly technical nature of the issues, each arbitrator was to be "a professional mining engineer, or firm of professional mining engineers." The leases provide that the arbitrations shall be conducted subject to the commercial arbitration rules of the American Arbitration Association ("AAA"). Pet. App. 65a-66a.

B. Arbitration Proceedings

Delta Mine designated the mining firm of Stagg Engineering Services, with which it had a long-standing consulting relationship, as its party-appointed arbitrator for both panels. AFC designated Paul Jones, who had served as AFC's arbitrator in a previous case between the parties (R. 0327-28),[1] as its arbitrator for both panels. Each party-arbitrator described himself as "representing" the appointing party on the panel. The party-arbitrators then selected a neutral—what AFC called the "umpire" (R. 0310)—for each panel.

The panels voted to conduct joint organizational meetings and, in part, joint evidentiary hearings. Each panel deliberated separately.

Pursuant to the leases, the conduct of the arbitration was to be governed by the commercial arbitration rules of the American Arbitration Association. Pet. App. 66a. Those rules, consistent with this Court's decision in *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968), require a *neutral* arbitrator to specifically disclose a range of matters that might affect his or her neutrality. Consistent with the fact that neither party has a right to veto the opposing side's party-arbitrator (except for failure to

[1] Following the format used by Petitioners, citations to "R." refer to the record on appeal in the Eighth Circuit.

comply with qualifications set forth in the parties' agreement), the rules impose no disclosure obligations on the partisans.[2] As the Eighth Circuit noted in the proceedings below, those Rules provide that, "absent an agreement to the contrary, party-appointed arbitrators are presumed to be non-neutral." 280 F.3d at 822 n.4.

The parties then reaffirmed that the AAA commercial arbitration rules governed. R. 0324. Moreover, the parties each confirmed that those rules afford the arbitrators themselves broad latitude to fashion procedures that would govern the conduct of the arbitration. *Id.* at 0324, 0327.

On the subject of disclosures by party-arbitrators, Delta Mine stated its belief that no such disclosures were required under the Rules, but it was ultimately left to the party-arbitrators to voluntarily make such disclosures that they felt appropriate. Delta Mine's arbitrator disclosed a longstanding client-consulting relationship with Delta Mine and its predecessors extending over a 15-year period. AFC's arbitrator, Jones, disclosed his prior service to AFC as an arbitrator.

The panels then considered the procedures that would apply. AFC pressed for a proceeding where the parties' lawyers would argue before the panels; Delta Mine favored an approach where the partial panel members would take the lead. The panel adopted the latter lawyer-limited approach, in which "the two partial panel members [Stagg and Jones] should be in a position to ask the pertinent questions of the witnesses, rather than having it turn into a more formal judicial [proceeding] with cross examinations and so forth."

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[2] The Commercial Arbitration Rules that govern the arbitration do *not* incorporate the document known as the "Code of Ethics for Arbitrators in Commercial Arbitrations." Indeed, the Code states that "it does *not* form a part of the arbitration rules of the American Arbitration Association."

280 F.3d at 818. Thus, the arbitration panels assigned the two partial panel members an instrumental role in the preparation and presentation of their party's case.[3]

Delta Mine's arbitrator had several meetings with counsel and other representatives of Delta Mine to prepare for the upcoming hearings. The existence of these communications was disclosed during discovery in the arbitration, and AFC's counsel objected to the arbitration panels, claiming that a party-appointed arbitrator should not play so active a role in preparing the case. The panels, including AFC's arbitrator, "[t]horoughly discussed" the roles of the party-appointed arbitrators and rejected AFC's objections, finding them contrary to the panels' prior instructions. R. 0431.

AFC's party-arbitrator then communicated the panels' decision to AFC (both parties openly communicated *ex parte* with their arbitrator). He reported to AFC that the neutrals were not "taken back" by the party-arbitrators' participation in preparation sessions. 280 F.3d at 819. To the contrary, AFC's party-arbitrator reported that the neutrals "expect the Party Arbitrator to be adequately briefed to know where the testimony is going and to be able to ask questions for clarification, etc." *Id.* In fact, the neutrals expressed surprise that AFC and its partisan arbitrator were not doing the same. R. at 0798.

Following the hearings, during deliberations, the neutrals continued to use the partial panel members as a direct link to the party each represented.[4] Thus, with the full knowledge of

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[3] Indeed, when AFC asserts in its petition that Stagg and his firm had a sinister, undisclosed interest based on its receipt of money from Delta Mine (Pet. 2, 5), AFC neglects to mention that Stagg Engineering Services was largely paid for its efforts in preparing and presenting the case as specifically directed by the panels (compensation was not tied to any particular outcome).

[4] This did *not* extend to allowing the parties to submit additional *evidence* after the deliberations began.

the opposing partisan, the partisan panel members were allowed to go back to their parties to help identify evidence in the record or clarify their respective parties' position.

The neutrals prepared the final decisions. The final decisions were concurred in by each partisan to the extent that the decision affirmed its party's position.

C. District Court Proceedings

Following limited discovery, and based on a paper record, the district court vacated the awards. Citing no case law, and clearly uncomfortable with the notion of an "arbitrator-advocate," the district court declared that "the conduct of Delta Mine's arbitrator" went far beyond "the proper role of a party-appointed arbitrator." Pet. App. 18a. The district court looked to the AAA Code of Ethics as a source of governing rules, notwithstanding the district court's acknowledgement that the parties had never agreed to incorporate those code provisions into the arbitration.[5] Most importantly, the court declined at any point to acknowledge the substance or implications of the arbitration panels' own rulings about the active role to be played by the party-arbitrators in the conduct of the proceedings. The panels themselves had *decided* the proper role of the party-arbitrators.[6]

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[5] The district court got it backwards by suggesting that the "Code" became a governing standard because the parties "did not agree to waive the provisions of the Code." Pet. App. 39a. To the contrary, the parties never agreed to adopt the Code as providing controlling rules for the arbitration. In fact, the district court found that "there was apparently no meeting of the minds about . . . whether the Code of Ethics for Commercial Arbitrators ("Code") would apply to the arbitrations." Pet. App. 37a.

[6] For example, the district judge disparagingly termed Delta Mine's arbitrator the "inside-mouthpiece" for Delta Mine, without acknowledging that this was precisely the role that the arbitration panel itself had assigned to the party-arbitrators.

Finally, the district court's decision was pervaded with clear factual error. Much of the district court's criticism of Delta Mine's party-arbitrator was ultimately rooted in the district court's "finding" that he had secretly communicated with Delta Mine during deliberations—a point no longer even pressed in the Petition to the Court. The district court reached its conclusions on this point *sua sponte*, notwithstanding that (as the court acknowledged) AFC had presented no issue on the point and Delta Mine had never had the opportunity to respond with evidence or argument. The district court's conclusions on this point—and the resulting criticisms of the integrity of both Delta Mine's arbitrator and Delta Mine's counsel—were wholly unjustified and unsupported. Not only was the behavior of Delta Mine's party-arbitrator consistent with the procedures established by the panels, but the neutral arbitrators were also fully aware of these contacts.[7] In fact, as further evidence that all of the parties and arbitrators recognized such communications to be proper, the Eighth Circuit noted that there was "credible evidence" that AFC's party-arbitrator knew of these communications and was communicating likewise with AFC. 280 F.3d at 823.

Given the district court's erroneous "finding" that Delta Mine's arbitrator had engaged in such surreptitious communications, it is not surprising that the trial court's opinion is littered with attacks on his character and integrity (these attacks also form the basis for the various assertions about "concealment," "deceit," and "chicanery" leveled throughout the Petition to this Court). But that root "finding" is simply baseless. As the Eighth Circuit properly noted, the neutrals

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[7] The record clearly establishes that the neutral arbitrators were aware of the communications between the parties and their arbitrators. At one point, a neutral panel member directed Delta Mine's arbitrator to seek clarification from Delta Mine and its parent company (R. 0461) and, on at least one occasion, Delta Mine's arbitrator reported to the neutral that he had been in contact with Delta Mine and its counsel (R. 0502-03).

were not misled or deceived and the parties behaved "precisely as one would expect from the terms of the agreements to arbitrate." *Id.* at 822.

D. The Eighth Circuit Decision

In a unanimous decision, the United States Court of Appeals for the Eighth Circuit reversed. The court found the District Court's decision insupportable for three separate and independent reasons: (1) that there was no showing of any violation of the Federal Arbitration Act's substantive provisions allowing for vacation of an award; (2) there had been no showing of prejudice arising from anything about which AFC had complained; and (3) AFC had never objected to the continued participation of Delta Mine's arbitrator in the proceeding. The Eighth Circuit noted at the outset that the court's power to overturn an arbitral award is limited to the grounds set forth in the Federal Arbitration Act. Because the Preamble to the AAA Code of Ethics provides that it is not part of the AAA Rules and does not form a ground for judicial review of an award (R. at 0293-94), the Eighth Circuit rejected the notion that the Code of Ethics sets forth binding rules to govern the arbitration when it has not been adopted by the parties.[8] Rather, the Eighth Circuit upheld the right of the parties to contract for an agreed form of arbitration that permitted a panel comprised of one neutral and two partisans.

The court noted numerous cases upholding an arbitration panel composed of a neutral panel member and two partisan arbitrators, and held there was nothing "insidious" about the

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[8] In so holding, the court was ruling consistently with the decisions of other courts. *ANR Coal Co. v. Cogentrix of N.C., Inc.*, 173 F.3d 493, 497 n.2 (4th Cir. 1999) (refusing to apply the code where the parties agreed only to arbitrate according to the AAA rules), *cert. denied*, 528 U.S. 877 (1999); *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 680 (7th Cir. 1983.

procedures the panels employed. An arbitration panel is free to customize the procedures to govern the arbitration as it sees fit. Further, the neutrals were not deceived, which means there could be no prejudice. The court also held that, while AFC objected to the arbitration panels about certain procedural particulars, it never sought the removal of Delta Mine's arbitrator for partiality.

The Eighth Circuit directed confirmation of the awards in their entirety, both as to the main portion of the awards and on the "Williamson offset issue" where the award had been in AFC's favor. 280 F.3d 824.

ARGUMENT

Petitioner presents no issue warranting a writ of certiorari. Petitioner suggests no conflict among the Circuit Courts. There is no inconsistency between the decision below and any decision of this Court. The case decides no matter of national importance, but rather addresses the specifics of the particular contractual arbitration clauses agreed to by the parties. Moreover, both in describing the applicable principles and applying them to the situation at hand, the decision of the Eighth Circuit is clearly correct. Petitioner does not offer a plausible basis for certiorari on any of the three grounds for decision below, let alone on all of them.

I. THIS CASE IS NOT IN CONFLICT WITH COMMONWEALTH COATINGS

AFC's assertion that its petition warrants a writ of certiorari rests primarily on AFC's mistaken insistence that the decision of the court below is inconsistent with this Court's decision in *Commonwealth Coatings*, 393 U.S. 145, particularly as it concerns the existence of an obligation to fully disclose potential conflicts of interest. Petitioner is wrong for at least three reasons. First, *Commonwealth Coatings* addresses the disclosure obligations of a neutral

arbitrator, not concededly partial arbitrators on a tripartite panel, who (under the Rules applicable to this arbitration) had no disclosure obligations. Second, while the proper rule under the procedures adopted by the parties in this case is that a non-neutral, party-appointed arbitrator has no obligatory duty of disclosure, the Eighth Circuit found in this case that the partial arbitrator had, in fact, voluntarily made a sufficient disclosure of his partiality. Third, the "interest" that Petitioner complains of—that the arbitrator was involved in the preparation of the case—was specifically approved by the arbitral panel as appropriate to these proceedings.

1. *Commonwealth Coatings* does *not* speak to the issue presented by Petitioner here. *Commonwealth Coatings* addressed the disclosure obligations of a putative *neutral* arbitrator. The obligation to disclose sources of potential conflict of interest serve a vital interest as respects an arbitrator who is required to be *impartial*. The requirement that the putative neutral disclose facts bearing on his or her neutrality provides a means to assure the impartiality of a neutral, which, in turn, is the foundation on which the integrity of the process depends. Specifically, it allows both parties to knowledgeably exercise their right to reject, or object to, the neutral arbitrator for cause, *i.e.*, as not, in fact, neutral.

In arbitrations of the type at issue here, which are commonplace in the United States (Pet. 18), the party-arbitrators perform functions fundamentally different from the neutral. Each party chooses his own "party-arbitrator." There is no requirement that he or she be unbiased *unless* the arbitration agreement specifically so provides. The AAA Rules, incorporated into the parties' agreement here, specifically provide that the party-appointed arbitrators are presumed to be *non-neutrals* and are not subject to the disclosure rules applicable to neutrals. R. 0283 at § 12. In a setting where partiality is

presumed, neither side possesses a right to veto the other side's choice, or a right to object to the partiality of the opposing side's party-appointed arbitrator.

Thus, it does *not* violate the "evident partiality" standard of the Federal Arbitration Act, 9 U.S.C. § 10(a)(2) (2000), for the non-neutral arbitrators on a tripartite panel to be predisposed to their appointing party, to communicate with the appointing party, be involved in witness preparation, and advocate their party's position. Such involvement is "not only unobjectionable, but common place." *Sunkist Soft Drinks, Inc. v. Sunkist Growers Inc.*, 10 F.3d 753, 759 (11th Cir. 1993) (party-arbitrator did not engage in misconduct by meeting with witnesses, "suggest[ing] lines or areas of testimony," and assisting in the preparation for hearing), *cert. denied*, 513 U.S. 869 (1994); *Cia de Navegacion Omsil, S.A. v. Hugo New Corp.*, 359 F. Supp. 898, 899 (S.D.N.Y. 1973) ("As everyone knows, the party's named arbitrator . . . is an amalgam of judge and advocate . . . [h]e is, or may be, a somewhat interested participant . . ."); *Stef Shipping Corp. v. Norris Grain Co.*, 209 F. Supp. 249 (S.D.N.Y. 1962) (no misconduct in conferring with appointing party and reviewing documentary evidence before the hearing); *Petrol Corp. v. Groupement D'Achat Des Carburants*, 84 F. Supp. 446, 447 (S.D.N.Y. 1949) ("no reason appears why the parties could not mutually agree to let one arbitrator decide the issue, thus treating him as an umpire and the other arbitrators as advocates and agents of the parties designating them").

Many state courts have similarly recognized that party-arbitrators are not neutrals. *See Meehan v. Nassau Cmty. Coll.*, 676 N.Y.S.2d 178, 181 (N.Y. App. Div. 1998) ("'partiality' of a party-designated member of an arbitral board may not be the basis for vacatur"); *Anderson v. Nichols*, 359 S.E.2d 117, 123 (W. Va. 1987) (coal-industry royalty arbitration: "where each party selects one arbitrator and the two

so selected choose a third, the parties expect their personally-named arbitrators to be the advocates for each respective position").

Thus, when an arbitration panel includes arbitrators selected by the parties, the "element of partiality" is presumed as to the party-appointed members and there is no basis to overturn the award unless the panel as a whole is biased. *Yorkaire, Inc. v. Sheet Metal Workers Int'l Ass'n Local 19*, 758 F. Supp. 248, 257 (E.D. Pa. 1990) (failure to demonstrate "the arbitration *panel* was biased"), *aff'd*, 931 F.2d 53 (3d Cir. 1991). "The parties to an arbitration . . . can ask for no more impartiality than inheres in the method they have chosen." *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 679 (7th Cir. 1983). As one court recently summed up the premise of most tripartite arbitrations:

> An arbitrator selected by one of the contesting parties is effectively an advocate of such party. The third party mutually selected by them is expected to be the impartial and final judge.

Ad-Med, Inc. v. Iteld, 728 So.2d 556, 559 (La. Ct. App. 1999).[9]

A putative neutral arbitrator's affirmative duty to disclose sources of potential conflicts of interest serves a vital function—revealing potential sources of partiality—that is simply not relevant with respect to a party-arbitrator, for whom partiality is assumed. *See Sheet Metal Workers Int'l Assoc. Local 420 v. Kinney Air Conditioning Co.*, 756 F.2d 742, 746 (9th Cir. 1985) (disclosure requirements of *Commonwealth Coatings* are "inapposite" where parties are aware of arbitrator's partiality based on the method of arbitration chosen by the parties). Moreover, disclosure serves no

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[9] Petitioner's repeated references (Pet 4, 7) to Delta Mine's arbitrator providing the "deciding vote" is misleading. It is the umpire that provided the deciding vote in each instance.

function because there is no right to demand removal of the opposing party's party-arbitrator. Petitioner's current assertion that neutrals and non-neutrals are both required to make the same sorts of disclosure of interest ignores the fact that there is no purpose in requiring disclosure by party-arbitrators.

The AAA Rules, which the parties made part of their arbitration agreement, and which governed these arbitrations, imposes extensive disclosure obligations on any arbitrator serving as neutral, but none on party-appointed arbitrators. R. 0283-84, §§ 12, 19. The parties are free, of course, to *agree* upon some different role for, or obligations upon, the party arbitrator.[10] But the parties did not do so here.

Moreover, a legislative body would be free to impose different requirements. However, contrary to Petitioner's assertions (Pet. 17-18), there is no "trend" to hold party-appointed and neutral arbitrators to "the same standards of independence and partiality." Pet. at 17.[11] But, absent some

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[10] They would be free, for example, to incorporate the AAA Code of Ethics, which requires specific disclosures by the neutral and certain general disclosures by a party-arbitrator (R. 0301) into the arbitration agreement. Delta Mine's arbitrator, upon being asked to do so, made a general disclosure fully compliant with the hortatory provisions of the Code. *Id.* at 0330. Although Petitioner suggests to the contrary (Pet. 6), the parties did not agree to abide by the Code in this case. R. 0326-28. Thus, the Eighth Circuit properly held that the Code did not provide controlling standards for judging the conduct of the parties here. 280 F.3d at 820.

[11] Petitioner mischaracterizes the recent revisions to the Uniform Arbitration Act ("UAA"). Pet. 17-18. The revisions to the UAA actually eliminate evident partiality by a party-appointed arbitrator as a ground for vacatur. A reading of the entire text of section 12 (Petitioner includes only the text of subsections 12(a) and 12(b) in the petition) directs that the consequences for failure to disclose according to section 12 are addressed in section 23(a)(2), "Vacating Award." Comment 4 to section 12 notes that "[a] party-appointed, non-neutral arbitrator's failure to disclose would be covered under the corruption and misconduct provisions of Section

specific agreement to a different rule in a particular case, the federal courts are not free to impose such requirements on a party-appointed arbitrator under the guise of Federal Arbitration Act review of an arbitration award.[12]

Drawing upon language from the district court's opinion, Petitioner's arguments ultimately rest on the erroneous assertion that this case involves some form of "deceitful" or "sharp" practice (Pet. 3), "chicanery" (*id.* at 19), or lack of "integrity" (*id.*). As explained above (*supra*, at 7), and as the Eighth Circuit concluded, there is simply *no* basis in the record to assert that either the neutrals or AFC was misled or deceived. 280 F.3d at 822. The Eighth Circuit properly applied the standards of the Federal Arbitration Act to the facts presented by this case.

2. Although Petitioner seeks to raise a challenge concerning the extension of *Commonwealth Coating's* disclosure rule to partial arbitrators, no such issue is actually presented by the Petition. Petitioners' attempt to present this issue to

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23(a)(2) because in most cases it is presumed that a party arbitrator is intended to be partial." More importantly, section 23(a)(2) specifically *excludes* evident partiality by a party-appointed arbitrator as a grounds for vacatur. Comment 1 to section 23 explains that "[t]he reason 'evident partiality' is a grounds for vacatur only for a neutral arbitrator is because non-neutral arbitrators, unless otherwise agreed, serve as representatives of the parties appointing them."

[12] In support of a contrary suggestion, Petitioner can cite only two district court decisions. The first, *Standard Tankers (Bahamas) Co. v. Motor Tank Vessel AKTI*, 438 F. Supp. 153 (E.D.N.C. 1977), is a 23-year old opinion from the Eastern District of North Carolina that improperly appears to reject the very concept of an arbitration panel composed of two partisans and a neutral. *Id* at 159. Further, there is no suggestion that the AAA Rules applied to the arbitration in that case. The second, *Metropolitan Property & Casualty Insurance Co. v. J.C. Penney Casualty Insurance Co.*, 780 F. Supp. 885 (D. Conn. 1991, likewise discusses disclosure and other obligations of the party-appointed arbitrator, but the court derived the particular obligations imposed on the party-arbitrator there from the specific terms of the parties' agreement. *Id.* at 893.

the Court is based on an entirely false premise, *i.e.*, that Delta Mine's party-arbitrator did not properly disclose his prior consulting relationship with Petitioners. The panel below did not even have occasion to address the question whether it would be appropriate to make no disclosure (though, as shown above, it would be) because the Eighth Circuit found that Delta Mine's arbitrator did make a sufficient disclosure. 280 F.3d at 821.

Here, in response to a request, Delta Mine's arbitrator voluntarily disclosed that he had a client-consultant relationship with Delta Mine extending over 15 years. *Id.* This broad disclosure easily satisfied any sensible standard of disclosure under the circumstances. Significantly, when he made that disclosure, Petitioner raised no objection and did not even pose a follow-up question. That is because—in contrast with the position Petitioner asserts here—there was simply nothing shocking, improper, or even surprising in that disclosure, precisely because the partiality of the non-neutrals was assumed. Delta Mine's arbitrator could not have perceived any obligation "to disclose more than his longstanding 'client consultant relationship,' absent a direction from the neutral arbitrators to do so." 280 F.3d at 821. As the Eighth Circuit observed, AFC offers no authority for the proposition that such an allegedly incomplete assertion constitutes "evident partiality" under the FAA. *Id.*

3. Although Petitioners frame their argument in terms of "nondisclosure" of a prior consulting relationship (in an unsuccessful effort to bring the issue presented under the umbrella of *Commonwealth Coatings*), that was not the thrust of Petitioner's objection to the arbitration award in the lower courts. Instead, Petitioners concentrated below on the asserted failure to disclose the precise extent of the work that the arbitrator and his firm undertook when preparing for the technical aspects of the case. *See* Pet. 5-6. Petitioner

believes that such actions should be regarded as improper—and, to invoke *Commonwealth Coatings,* couches its objection to that activity as a failure to disclose that activity.

Yet, once again, these very actions were disclosed. Based on the disclosures, Petitioners in fact expressly complained to the panels that Delta Mine's arbitrator was too closely aligned with Delta Mine's trial team and was exhibiting "evident partiality." Both panels considered and rejected that challenge, noting in their deliberations that the actions being objected to were precisely the actions that the party-arbitrators were required to undertake pursuant to the panels' specific direction that they be prepared to present the case for their respective parties. There is simply no basis in the record for asserting that the assistance of Delta Mine's arbitrator in preparation of the case was "undisclosed."

II. PETITIONER FAILED TO SHOW PREJUDICE

The Eighth Circuit also held that Petitioner failed to show prejudice to which Petitioner responds that no showing of prejudice should be required. To be sure, where the issue concerns the impartiality of a *neutral* arbitrator, a showing of bias can itself be determinative. The inability of the umpire to decide the case objectively, free from bias, would almost invariably affect the outcome.

On the other hand, if one is to try to base a challenge on an asserted non-disclosure by a party-appointed arbitrator, a showing of "prejudice," as required by the Eighth Circuit, is clearly necessary.[13] The Eighth Circuit simply required a

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[13] Courts require some showing of prejudice, or a causal nexus between the alleged evident partiality and the award, to vacate arbitration awards based on evident partiality of a non-neutral arbitrator. In *Sunkist*, 10 F.3d 753, the court refused to vacate an award because a party-arbitrator participated in case preparation meetings and may have prejudged the merits of the dispute. The court "fail[ed] to see how this prejudiced Sunkist" because there was no evidence that the party-arbitrator discussed

showing that the neutral was "deceived or misled" by the party-arbitrator's partiality or non-disclosure. 280 F.3d at 822. This rule is self-evident: If the neutral arbitrator is not deceived, the non-disclosure cannot be material; it cannot have affected the outcome. Otherwise, any arbitration in which a party-arbitrator is openly partial, in accordance with the arbitration agreement or the direction of the arbitration panel, would be subject to reversal.

Here, the alleged undisclosed fact that Delta Mine's arbitrator was partial and assisting Delta Mine was not only known to the neutrals, but consistent with their direction to the parties and the party-arbitrators. *Id.* Moreover, Petitioner did not labor under any false assumptions here, having been fully apprised of the advocacy role of the party-arbitrators not once, but *twice*, long before the hearing. *Id.* Absent a showing of some prejudice of this type, the very idea of "non-disclosure" is meaningless.

III. THE EIGHTH CIRCUIT DID NOT ERR IN RAISING THE ISSUE OF WAIVER

As one of the three alternative grounds for decision, the Eighth Circuit held that AFC waived its objections by not pressing them before the arbitral panel.

While Petitioner protests the Eighth Circuit raising the issue *sua sponte*, Petitioner does *not* suggest that there was legal error in doing so, let alone a legal error sufficient to warrant certiorari. Nor does Petitioner assert that the Eighth

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the information received in the preparation meetings with the neutral arbitrators. *Id.* at 759-60; *see also Stef Shipping*, 209 F. Supp. at 253. This is not at odds with the case cited by Petitioner, *Metropolitan*, 780 F. Supp. 885, which holds that evident partiality "must be based on something overt, some misconduct on the part of an arbitrator, and not simply on his interest in the subject matter of the controversy or his relationship with the party who selected him." *Id.* at 892 (quoting *Astoria Medical Group v. Health Ins. Plan of Greater N.Y.*, 182 N.E.2d 85, 89 (N.Y. 1962)).

Circuit abused its discretion. Petitioner simply complains that the issue was raised *sua sponte* and cites two instances of an appellate court ruling that the defense of waiver was waived. These cases do not hold that an appellate court has no right to raise waiver *sua sponte*. To the contrary, the Eighth Circuit clearly had the authority to notice such error, particularly as an alternative ground of decision. "The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals." *Singleton v. Wulff*, 428 U.S. 106, 121 (1976). *See also Hormel v. Helvering*, 312 U.S. 552, 556-57 (1941); *United States v. Miller*, 152 F.3d 813, 815 (8th Cir. 1998). *E.g.*, *United States v. Continental Can Co.*, 378 U.S. 441, 457 (1964).

Moreover, the Eighth Circuit's waiver holding is clearly correct: It does nothing more than restate the salutary rule that if one seeks to challenge the partiality of the party-appointed arbitrator based on information learned during the arbitration, one must first present that challenge to the arbitration panel, requesting the arbitrator's removal.

Petitioner did not do so here. Petitioner concededly knew of Delta Mine's arbitrator's direct involvement in the preparation of Delta Mine's case, but *notwithstanding* that knowledge, did *not* seek his removal. Instead, AFC sought "a delay in the hearings" which was granted. 280 F.3d at 821. Thus, AFC "expressed concern" about the role assigned to the party-arbitrators by the panels, but did not seek the removal of Delta Mine's party-arbitrator. Consequently, the panels' decision concerning the role of Delta Mine's party arbitrator in case preparation was rendered informally (the panels' approval of the party-arbitrator's involvement in the presentation of the case is evident from the *ex parte* letter from Petitioner's party-arbitrator to Petitioner) and addressed procedurally.

Petitioner's argument that it only learned the particulars of the party-arbitrator's involvement after discovery in the district court does not provide an excuse. Petitioner was aware that Delta Mine's party-arbitrator was participating in case preparation "[w]eeks before the hearings" (280 F.3d at 822) and, after waiting a month, asked the panels to reconsider the role of the party-arbitrators because it could affect the party-arbitrator's ability to judge the case. *Id.* at 818; R. 0418. But Petitioner never sought disqualification. A party cannot do what Petitioner has tried here: register a procedural objection, correctable by the arbitration panel, and then wait until after losing the arbitration to argue to the district court that there was an error of such magnitude that it fundamentally tainted the arbitral award.

Leaving aside that there was no impropriety or error here at all, the Eighth Circuit certainly did not err in requiring that a claim of such impropriety be made in the first instance to the arbitral panel itself.

CONCLUSION

The writ of certiorari should be denied.

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No. 01-1709

IN THE

Supreme Court of the United States

AFC COAL PROPERTIES, INC.,

Petitioner,

v.

DELTA MINE HOLDING COMPANY
and MEADOWLARK, INC.,

Respondents.

On Petition for Writ Of Certiorari to the United States Court Of Appeals for the Eighth Circuit

REPLY BRIEF

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REPLY BRIEF

I. RESPONDENTS' COUNTERSTATEMENT OF THE CASE SHOULD BE GIVEN NO WEIGHT

Delta won its appeal below based on the law, not the facts. The district court vacated the arbitration awards because arbitrator Stagg deceived AFC about his relationships with the parties and his interests in the proceedings and the parties. The court of appeals reversed the district court on legal grounds, ruling that the decision to vacate was founded on an incorrect reading of the Federal Arbitration Act and *Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145 (1968).

The court of appeals limited its review largely to the legal underpinnings for the district court's decision to vacate, including in particular, the Eighth Circuit's unprecedented ruling that the disclosure obligations of *Commonwealth Coatings* do not apply to party-appointed arbitrators. For that reason, the Eighth Circuit left virtually untouched the district court's findings about Stagg's intentional efforts to conceal his relationships and interests.

With this backdrop, Delta's "Counterstatement" of the facts is nothing less than remarkable. Although Delta does not itself seek to raise any Question for consideration in its opposition brief, it nonetheless reargues the facts which the district court already found in favor of Petitioner AFC. Almost half of Delta's Brief in Opposition is devoted to this effort. Indeed, for the most part, Delta simply presents its own version of the facts to this Court as if the courts below had not already adjudicated the facts against Delta.

The key district court fact findings, which were not vacated, are entitled to deference unless clearly erroneous. Pet. at p. 7; *Kiernan v. Piper Jaffray Cos., Inc.*, 137 F.3d

588, 591 (8th Cir. 1998)[1] Accordingly, Delta's attempt to reargue the facts is inappropriate and should be given no weight. *See, e.g., Goldfarb v. Virginia State Bar*, 421 U.S. 773, 784 n.10 (1975); *Phillips Chem. Co. v. Dumas Indep. Sch. Dist.*, 361 U.S. 376, 481 n.12 (1960).

Delta takes great liberties with the record. It contends that although the parties agreed to abide by the AAA Rules (which do not adopt the AAA's Code of Ethics), they never agreed to follow the ethical standards in the Code of Ethics. (Opp. at p. 13) Delta's contention was firmly rejected by the district court:

> At the initial scheduling conference, AFC passed out both the Rules and the Code and made several statements that it believed the Code applied to the arbitrators in this case. . . . Stagg accepted the Code and made a misleading partial disclosure about the nature and extent of his relationship with Delta Mine and Delta Mine's counsel that did not comply with the requirements of the Code. . . . . I find that AFC reasonably believed, *and the parties agreed*, that the party-appointed arbitrators were going to follow the provisions of the Code applicable to non-neutral arbitrators. (App. B at pp. 39a-40a) (emphasis added).

Delta also attempts to reargue that even if the Code of Ethics or *Commonwealth Coatings* applies, Stagg made a sufficient disclosure during the organizational meeting. (Opp. at p. 13, n.10) But Delta ignores that the district court explicitly found otherwise (App. B at p. 40a) and also found that Delta had abandoned this claim. (*Id.* at p. 38a, n.6).

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[1] Citations to "Pet." refer to the Petition; citations to "Opp." refer to Respondents' Brief in Opposition.

Delta further claims that AFC should have known what Stagg had in mind because the arbitration panels purportedly assigned the party arbitrators a role in "*preparing*" their party's case. (Opp. at p. 5) However, the opinions issued by both courts below make clear that the arbitration panels simply requested the party arbitrators to be in a position to question witnesses at the hearing. This is a far cry from Delta's new claim that AFC should therefore have surmised that Stagg and his consulting company SESI would play a substantial role in shaping Delta's case, preparing testimony and witnesses, creating exhibits, and accepting nearly $300,000 in fees to engineer the case Stagg later was called upon to decide as arbitrator. Moreover, Delta wholly disregards Stagg's failure to disclose that he was again hired by Delta's counsel to serve as an expert consultant in another matter for another client before the arbitrations in this case were decided. (Pet. at pp. 5-6)

Contrary to Delta's contentions, the district court found that Stagg and Delta combined to deny AFC the opportunity to discover "the full nature and extent of Stagg's involvement in pre-hearing proceedings and his ongoing relationship with Delta Mine," (App. B at pp. 22a-23a), adding weight to the district court's conclusion that Stagg was guilty of evident partiality. (*Id.* at p. 47a)

II. DELTA CANNOT RESOLVE THE CONFLICT BETWEEN THE EIGHTH CIRCUIT DECISION AND *COMMONWEALTH COATINGS*

In its opposition brief, Delta seeks to divorce the disclosure standards of *Commonwealth Coatings* from § 10(a) of the FAA. However, while the arbitrator in *Commonwealth Coatings* was the third arbitrator on a tripartite panel, nothing in the reasoning of the Court's opinion suggests that it was establishing a disclosure duty for some but not all arbitrators. FAA § 10(a) condemns evident partiality in all arbitrators and makes no distinction for

arbitrators who are "predisposed," "not impartial," "non-neutral," "partisan," or "party-appointed."

Delta simply ignores the primacy of the FAA and *Commonwealth Coatings* in setting the requirements for whether an arbitration award will be transformed into a federal court judgment. Delta turns the precept on its head when it argues that, "the federal courts are not free to impose such requirements on a party-appointed arbitrator under the guise of Federal Arbitration Act review of an arbitration award." (Opp. at pp. 13-14)

Although Delta eschews any review or analysis of *Commonwealth Coatings*, both the Court's opinion and Justice White's concurrence plainly contemplate a broad but flexible rule of disclosure as a precondition to confirmation under the FAA. Justice White made this clear:

> arbitrators are not automatically disqualified by a business relationship with the parties before them *if both parties are informed of the relationship in advance*, or if . . . the relationship is trivial." 393 U.S. at 150 (emphasis supplied).

Delta's brief, in fact, highlights the conflict between *Commonwealth Coatings* and the appellate decision below. For example, Delta suggests that the Eighth Circuit found Stagg made a "sufficient" disclosure, implying that he made the kind of disclosure required by *Commonwealth Coatings* or the Code of Ethics. (Opp. at p. 15) Of course, the court of appeals said nothing of the kind. The court simply held that if AFC could infer that Stagg was not neutral, then it should expect that he had the same interests and duty of loyalty as an officer, employee or attorney of Delta. (App. A at p. 10a) Stagg's disclosure of a prior consulting relationship with Delta's predecessor, according to the Eighth Circuit, was sufficient to put AFC on notice that Stagg was not neutral. *Id.*

Delta also contends that because the AAA rules provide no mechanism for objecting to a party-appointed arbitrator, no functional purpose is served for the party arbitrator to disclose his interests and relationships. This argument fails for several reasons. First, it again fails to recognize the FAA's primacy. *Commonwealth Coatings* makes clear that the salutary purpose of disclosing relevant relationships and interests is the fundamental assurance that the parties to the arbitration are getting a fair shake and that their reasonable expectations for the process are being met.

Moreover, in this case the parties agreed to apply the Code of Ethics. The Code not only establishes standards of integrity for party arbitrators, but also imposes on them an ongoing duty to disclose.[2] Furthermore, irrespective of any other rights, a party always has the right to challenge arbitrators under the FAA for evident partiality, corruption or other misconduct. Without meaningful disclosures, these rights become illusory.

A number of courts have ruled that FAA § 10(a) and the *Commonwealth Coatings'* disclosure obligations apply equally to party-appointed arbitrators. *See, e.g., Standard Tankers (Bahamas) Co., Ltd. v. Motor Tank Vessel, AKTI*, 438 F. Supp. 153, 159 (E.D. N.C. 1977), *Metropolitan Prop. & Cas. Ins. Co. v. J.C. Penney Cas. Ins. Co.*, 780 F. Supp. 885 (D. Conn. 1991); *Barcon Assocs. Inc v. Tri-County Asphalt Corp.*, 430 A.2d 214 (N.J. 1981). Delta's feeble

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[2] Similarly, the revisions to the Uniform Arbitration Act, U.L.A. § 12 (2000), now require full disclosure by all arbitrators, even though party arbitrators under the UAA cannot be challenged for evident partiality. (Pet. at pp. 17-18)

effort to distinguish these cases[3] only underscores that the Eighth Circuit's decision marks a regressive shift in applying the FAA. In sharp contrast to these decisions, and inconsistent also with *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753 (11th Cir. 1993) *cert. denied*, 513 U.S. 869 (1994), the court of appeals has created an exception to the duty of disclosure which actually encourages and even rewards the concealment of substantial relationships and interests by party-appointed arbitrators.

Although Delta acknowledges that evident partiality requires no separate showing of prejudice to vacate an award, it argues that the Eighth Circuit properly restricted this rule to impartial arbitrators (Opp. at p. 16). However, neither Delta, nor the Eighth Circuit, offer any precedent to so limit the disclosure rule in *Commonwealth Coatings*, nor any plausible rationale to warrant probing neutral arbitrators' thought processes to establish the impact of impermissible bias, something that is understandably difficult to ascertain. Evident partiality presumes prejudice; Stagg supplied the deciding vote in the arbitrations.

The recurring problem of a party-appointed arbitrator's concealment of interests is highlighted in a recent

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[3] Delta denigrates *Standard Tankers* as "a 23-year old opinion," (*Commonwealth Coatings* is a 34-year-old opinion), and erroneously asserts that the party arbitrator's duty to disclose found in *Metropolitan Prop. & Cas. Ins. Co.* was based solely on the parties' agreement. (Opp. at p. 14 n.12) To the contrary, the challenged party arbitrator's alleged failure to reveal his *ex parte* activities "violates the rule that an arbitrator must disclose at the time of his appointment 'any circumstances likely to create a presumption of bias or which he believes might disqualify him as an impartial Arbitrator.'" *Metropolitan Prop.* 780 F. Supp. at 893 (quoting *Commonwealth Coatings*, 393 U.S. at 149).

district court case, *Sphere Drake Ins. Ltd. v. All American Life Ins. Co.*, No. 01 C 5226, 2002 U.S. Dist. Lexis 8876 (N.D. Ill. May 17, 2002).[4] In that decision, Ronald Jacks, a retired law firm partner, was the party-appointed arbitrator for Sphere Drake. At the parties' organizational meeting, Jacks made limited disclosures about his prior relationships with Sphere Drake and that he was its party arbitrator in two pending arbitrations, but omitted to disclose that he personally had represented Sphere Drake in an arbitration while an active member of his law firm. *Id.* at *10.

Citing to the "simple requirement" of *Commonwealth Coatings* "that arbitrators disclose to the parties any dealings that might create an impression of possible bias," the court vacated the arbitration award because of Jacks' failure to disclose his substantial relationships with Sphere Drake.[5] *Id.* at *20. There, as here, the court was also concerned about more than Jacks' intimate connection to Sphere Drake: "What is at least as important as the connection itself, however, is the negligent or even intentional inadequacy of Jack's disclosure of the relationship." *Id.* at *28.

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[4] *Sphere Drake* is currently on appeal to the Seventh Circuit and has not been published yet. The district court's decision was docketed on May 20, 2002, too late to include in the Petition.

[5] According to the court, the parties had some right to approve or disapprove of the panel after disclosures were made. *Id.* at *21 n.8. However, all arbitrations are subject to review under the FAA for evident partiality, corruption, misconduct, or the use of undue means. None of these rights, as the court in *Sphere Drake* correctly observed, mean much unless all arbitrators disclose their relationships and interests with frankness and candor.

The issues presented in the Petition are important and a continuing source of litigation in the federal courts. The rule announced by the Eighth Circuit, freeing party arbitrators from any duty of disclosure under the FAA, invites the very chicanery which Stagg here employed and warrants review by this Court.

III. THE EIGHTH CIRCUIT IMPROPERLY RULED *SUA SPONTE* THAT AFC WAIVED ITS OBJECTION TO STAGG

Delta concludes by arguing that the "Eighth Circuit clearly had the authority" to rule, *sua sponte*, that AFC waived the right to challenge Stagg, going so far as to argue that Petitioner "does *not* suggest that there was legal error." (Opp. at pp. 17, 18) These claims ignore not only this Court's criticism of such action, but also the undisturbed record of these proceedings. Waiver was not apparent to the district court or to Delta in the proceedings below. Delta did not raise the issue. The detailed findings of the district court reveal that after Stagg made his initial "misleading disclosure" (App. B at p. 49a), AFC was able to learn only that Stagg and one of his associates had attended several meetings with Delta, its counsel, and some of their witnesses. Delta's counsel (who also later represented Stagg and SESI) prevented further discovery during the arbitrations regarding the nature of Stagg's activities by asserting privilege claims later found to be meritless. (*Id.* at pp. 22a, 29a-30a)

Delta's suggestion that AFC was then in a position to demand recusal but somehow held back is pure invention. (Opp. at p. 19) As the district court found, AFC wrote the arbitration panels to describe what little it had learned about Stagg's activities, which AFC viewed as improper, in order to request time and authority to "delve into the full nature and extent of Stagg's involvement in pre-hearing proceedings and his on-going relationship." (App. B at

pp. 22a-23a) Although Stagg participated in the panels' consideration of this request, he never disclosed to its members his and SESI's true activities. AFC and the panels remained uninformed regarding this critical information when the arbitrators refused to act on AFC's request. (*Id.* at p. 49a) Unable to obtain a formal response from the panels, AFC had no choice but to proceed with the arbitrations. *Cf. Aviall, Inc. v. Ryder Sys., Inc.*, 110 F.3d 892, 895 (2d Cir. 1997) (party may not seek removal of arbitrator before the issuance of the award under the FAA).

The Eighth Circuit's decision ignores the "general rule . . . that a federal appellate court does not consider an issue not passed on below." *Singleton v. Wulff*, 428 U.S. 106, 120 (1976). This Court has explained that this restraint is critical "in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues which the trial tribunal is alone competent to decide." *Hormel v. Helvering*, 312 U.S. 552, 556 (1941). Exceptions to the general rule exist, but they are few, such "as where the proper resolution is beyond any doubt . . . or 'where injustice might otherwise result.'" *Singleton*, 428 U.S. at 121 (citations omitted). *See also Arizona v. California*, 530 U.S. 392, 395 (2000) (rejecting argument that this Court should raise argument *sua sponte* because the "special circumstances in which such judicial initiative might be appropriate are not present here").

In *Singleton*, this Court criticized the Eighth Circuit for engaging in an "unacceptable exercise of its appellate jurisdiction" when the appellate court proceeded beyond the standing issue presented by a dismissal order on appeal to consider the merits of a challenge to a state abortion statute. 428 U.S. at 119-120. The matter did not present special circumstances which would justify the court's exercise of its discretion. Rather, "injustice was more likely to be caused

than avoided by deciding the issue without the petitioner's having had an opportunity to be heard." *Id.* at 121.

The Eighth Circuit here fails to point to exceptional circumstances to support its extraordinary recognition of an argument never raised in order to reverse the district court. The court of appeals does not find that the district court erred in its factual determinations, let alone explain how its conclusion exists "beyond any doubt" in the face of these contrary findings. *Id.* Having fashioned a waiver theory without regard to the detailed factual findings of the trial court and Respondents' own waiver of this point, the Eighth Circuit abused its discretion.

CONCLUSION

The petition for a writ of certiorari should be granted.

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